# REPORTS OF CASES

ARGUED AND DETERMINED

IN

# The Court of King's Bench,

DURING

TRINITY AND MICHAELMAS TERMS,

IN

THE FOURTH GEO. IV.

---

BY

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AND

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BARRISTERS AT LAW.

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## VOL. III.

WITH AN INDEX,

AND

*TABLE OF PRINCIPAL MATTERS.*

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1824.

# JUDGES

OF THE

# COURT OF KING'S BENCH,

*During the Period comprised in this Volume.*

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.

Sir ROBERT GIFFORD, Knt. ATTORNEY-GENERAL.
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OF THE

# CASES REPORTED

IN THE THIRD VOLUME.

The Cases printed in *Italics*, are from *MS.* Notes.

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# CASES

## ARGUED AND DETERMINE

## IN THE

# *COURT OF KING'S BENCH,*

## IN

# TRINITY TERM,

## IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.

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### HOLLIS *v.* BUCKINGHAM (*a*).

1823.

A similiter must be delivered; if not, defendant is entitled to sign judgment of non pros.

ON shewing cause against a rule for setting aside judgment of non pros for irregularity, the question was, whether the plaintiff, who had signed a similiter, was also bound to deliver it.

PER CURIAM.—According to the practice of the Court, as certified by the Master, the similiter should have been delivered.

Rule absolute for setting aside the judgment, upon payment of costs.

*Campbell*, for the plaintiff; *Curwood*, for the defendant.

(*a*) This, and the following cases, ending at page 83, were decided in *Easter* Term, but were omitted in Vol. II. in consequence of the inconvenient bulk which their insertion would have occasioned.

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BRANDT *v.* PEACOCKE.

*On 6th February, plaintiff took out a rule to discontinue his action upon payment of costs, to be taxed by the Master, and on the 7th, an appointment was given by the Master, but the costs were not i[illegible] taxe[illegible]id unti[illegible]h March. [illegible] the 29th January preceding, defendant, in that action sued out a writ against the plaintiff, for a malicious arrest, and filed his bill on the 8th February, and it being objected that the latter action was brought before the first was legally discontinued.—Held in the negative, and that the discontinuance had, (upon payment of the costs) relation back to the Term when the rule to discontinue was pronounced.*

CASE for a malicious arrest. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after last *Hilary* Term, it was objected on the part of the defendant, that the present action had been commenced before the former of *Peacocke* v. *Brandt*, upon which it was founded, had been legally discontinued. The facts admitted were these:—The former action was commenced in *Michaelmas* Term, 1820; on the 6th *February*, 1822, the plaintiff in that cause took out a rule to discontinue on payment of [illegible]; an appointment was obtained from the Master to tax on the 7th *February*, but the costs were not in fact taxed until the vacation, namely, the 11th *March*, on which day they were regularly taxed and paid. The writ in the present action was sued out on the 29th *January*, and the plaintiff filed his bill "on *Friday*, next after the morrow of the *Purification*," being the 8th *February*. The question was, whether, under these circumstances the former action was legally discontinued before the present suit was commenced; and under the directions of the learned Judge the plaintiff had a verdict, damages 15*l.*, with liberty to the defendant to move to enter a nonsuit upon the objection taken.

*Gurney*, on a former day in this Term, moved accordingly, and having obtained a rule nisi,

*Marryatt* now shewed cause, and contended, that the action was not brought too soon. The judgment of discontinuance had been properly obtained in the Term, and though the taxation of the costs had not been completed till the vacation, still it was a judgment of the Term, and when rendered complete by payment of the costs, had reference back to the day on which the rule to discontinue was first taken out. The judgment of dis-

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continuance, like all other judgments, is pronounced in Term time, and when completed has reference back to the Term in which it is pronounced. The rule to discontinue is the last proceeding in the cause anterior to the taxation of the costs, and therefore it must relate to the Term in which the rule is taken out. This was the rule of practice, and this rule had been acted on in *Bristow* v. *Heywood* (a), where the evidence was precisely the same as in this case, and where Lord *Ellenborough* observed, that no other evidence could be expected. The Court stopped him, and called upon

*Gurney* and *Holt*, contrà. It is a rule in actions for a malicious arrest, that the declaration must state in what manner the previous action was disposed of, and if not proved to be determined in the manner alleged it is ground of nonsuit (b). Here the former action was not legally determined until the 11th *March*, when the costs were taxed and paid, and consequently the present action being commenced previously to that time, cannot be maintained. The form of the rule to discontinue in K. B. is "It is ordered, *upon payment of costs*, to be taxed by the Master, that this action be discontinued (c)." The payment of costs is a condition precedent, and therefore until they are paid the action is not discontinued. The rule to discontinue is not in its nature obligatory upon the plaintiff, but may be abandoned by him in its progress, in which case the defendant has no remedy but by forcing the plaintiff on, for no attachment will lie against him for not paying the costs, *Stokes* v. *Woodeson* (d). It has been held, that a Judge's order to stay proceedings, when the costs had been paid, was not sufficient evidence of the determination of the first action in order to support the second; *Kirk* v.

(a) 4 Campb. 213. 1 Stark. N. P. C. 48. S. C.

(b) See Year Book, 2 R. 3. 9. pl. 22. Dyer, 284. Yelv. 117. Hob. 267. 10 Mod. 145. 209. Gilb. Cas. 163. Willes, 520. 1 Stra. 114. Dougl. 215. 2 T. R. 225. 1 Wms. Saund. 228, 229; and 2 Selw. N. P. 1030.

(c) Tidd's Forms, 268.

(d) 7 T. R. 6.

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*French* (*a*); and that was a much stronger case than the present, and a variety of cases seem to shew, that the rule for a discontinuance does not of itself determine the action, which is still considered as pending, and may be pleaded in abatement to another action. They cited *Hand* v. *Dinely* (*b*), *Smith* v. *Smith* (*c*), and *Fricker* v. *Eastman* (*d*), and relied upon *Whitmore* v. *Williams* (*e*).

Per Curiam.—The cases cited on the part of the defendant do not support the principle contended for. The difference between this case and *Whitmore* v. *Williams* is, that there the Court would not allow a plaintiff, by taking out a rule to discontinue, to arrest the defendant a second time before he paid the costs of the first action. That case proceeded to a certain degree, upon this principle, that until the discontinuance is complete, the former suit must be considered as depending, but when it is complete, it will relate back to the time when the rule to discontinue was taken out; and if the costs are paid in the vacation, the judgment must be of the preceding Term. The question in this case is, whether, when the conditions of the rule to discontinue are complied with, the discontinuance does not relate back to the Term in which the rule was taken out. We are of opinion that it does, and therefore this rule must be discharged.

Holroyd, J., said—When the costs were paid, the discontinuance was to be considered as perfect. There was no subsequent rule after the payment of the costs to render the judgment complete. The rule to discontinue is the judicial act of the Court; the rule authorizes the party to sign judgment as soon as the costs are taxed and paid, and I think the proper way to enter the judgment, was to enter it as of the day when the rule to discontinue was

(*a*) 1 Esp. N. P. 79.
(*b*) 2 Stra. 1220.
(*c*) 2 New R. 473, (n).
(*d*) 11 East, 319.
(*e*) 6 T. R. 765. See Barnes P. R. 252. 6 Price, 126. 7 Id. 674.

pronounced. The party would not have a right to enter it up until the costs were paid, but when paid, the rule of Court became effective. That is very different from the case cited, where the party, without getting the first judgment completed, brought another action in the mean time, and then prayed to enter the discontinuance nunc pro tunc, which the Court would not allow him to do, but permitted the defendants to plead in abatement that the former action was depending. If in the present case, the action had been brought before the former suit was determined, that might be the foundation of a motion to set aside the proceedings for irregularity, which would be a very different question. Here the defendant, in the first action, had a right to enter up the judgment as of record on the day when the rule to discontinue was given, and the judgment being rendered effective by the subsequent payment of costs, I think this action was not brought too soon (*a*).

Rule discharged.

(*a*) *Best*, J., was absent.

PICKARD *v.* DOBSON.

After bail had been opposed and allowed, it was discovered that one of them had on a former occasion been rejected for insufficiency, and though he had since become a person of property, the Court set aside the rule for allowance.

ON shewing cause against a rule for setting aside the allowance of bail, the facts were, that after the bail had been opposed and allowed, it was discovered that one of them had, on a former occasion, been rejected for insufficiency, but had since become a person of property; and although he now swore that he had no knowledge of his having been rejected,

*The Court* said it was a very wholesome rule, that once rejected, always rejected, and therefore made the

Rule absolute.

*Parke*, for the plaintiff; and *Chitty*, for the defendant.

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The KING *v.* CREWE.

By 55 *Geo.* 3. c. 68. s 2. the consent in writing for turning a footpath must be under the hand and seal of the owner of the land through which the new path is proposed to be made; therefore where an order of Justices for turning a footpath was founded upon a consent, signed and sealed by the *attorney* of one of the parties interested, and there being nothing to bind the principal:—Held ill, and quashed by this Court after confirmation by the Sessions. An order made under this stat. cannot be confirmed until the Sessions held next after the expiration of four weeks from the first day on which the notices required by law shall have been published; therefore, where an order was made for diverting a path, and notice thereof given on the 20th *December*, and it was confirmed at Sessions on the 17th *January*:—Held irregular, and quashed.

ON shewing cause against a rule for quashing an order of Justices for diverting and turning a footway, and for quashing an order of Sessions confirming the said order, the case was this:—The statute 55 *Geo.* 3. c. 68. s. 2. declares, that when it shall appear upon the view of any two or more Justices, that any footway, &c. may be diverted, so as to make the same nearer, or more commodious to the public, and the owner or owners of the lands through which such new footway, so proposed to be made, shall consent thereto by writing under his, her, or their hand and seal, or hands and seals, it shall be lawful by order of such Justices, at some Special Sessions, to divert and turn and stop up the same; provided that in such case a notice in writing shall be affixed at the place, and by the side of the foot way, from whence the same is directed to be turned, and also inserted in one or more newspaper or newspapers published, or generally circulated in the county, where the parish in which such footway shall lie, for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish in which such footway shall lie, on three successive Sundays subsequent to the making of such order; and the said several notices having been so published, the said order shall, at the Quarter Sessions holden within the limit where the footway shall lie, next after the expiration of four weeks, from the first day on which such notice shall have been published, be returned to the clerk of the peace in open court, and lodged with him, and the said order shall at such Quarter Sessions be confirmed, &c." The order in question was made on the 20th *December*, 1822, at a Petty Sessions, founded upon a consent in writing, purporting to be under the hands and seals of the owners of

the lands through which the new footway was proposed to be carried, but the consent was in fact signed and sealed by the attorney of one of the parties interested, and not by that party himself; and there was nothing to shew that he acted by procuration, or in a representative character. The order having been so made, and the notices thereof required by the act having been given, was confirmed at the next Quarter Sessions, which were holden on the 17th *January* last. An affidavit was produced, shewing that the attorney signing and sealing the consent had a power of attorney from his client so to do, but that instrument had not been enrolled at the Sessions. The questions were, first, whether the originial order was valid and binding, having been founded upon a consent signed and sealed by the attorney only of one of the parties interested; and second, whether the order of Sessions confirming such order, was valid, having been made before the expiration of four weeks from the first day on which the notices for diverting the footway had been published.

*Scarlett*, *F. Pollock*, and Sir *Gregory Lewin*, shewed cause against the rule; and *Puller*, contrà, was stopped by the Court.

Per Curiam.—We are of opinion that both the orders must be quashed. As to the original order for diverting the footway, we think that the consent should have been signed and sealed by the parties personally interested, or by a person who appeared to be duly authorized, to bind them. Here the consent is signed and sealed by an attorney, with his own name and seal, and there is nothing to shew that those acts were done for and on behalf of his principal. It is true, that the principal has now made an affidavit of his having executed a power of attorney, authorising his attorney to act for him, but that instrument not having been enrolled at the Quarter Sessions, there is nothing to give validity to the order. The public are to look to the records

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of the Quarter Sessions for authentic evidence that all the requisites of the act of parliament have been complied with. The act requires that the consent shall be under the hand and seal of the party over whose lands the new path is to pass, and when that requisite has been complied with, the public are effectually secured in the enjoyment of the new footway; but if there is nothing but the signature and seal of the person who happens to be the solicitor or attorney of the party really interested, and he executes in his own name, and not in the name of the principal, the public have not that security which the legislature intended should be given; and there being nothing before us to supply this defect, it is quite clear that the original order for diverting this way is bad. But supposing the original order to be valid, still, the proper steps have not been taken to render it binding. The statute requires three distinct species of notice: first, a notice at the place whence the footway is directed to be turned; second, a notice in the newspapers; and third, a notice at the church door; and then it requires that such notices having been so published, the order for the purpose of confirmation, shall be returned to the clerk of the peace at the Quarter Sessions holden next after the expiration of four weeks from the first day on which such notices shall have been published. Now, here the order is made on the 20th *December*, and it is confirmed at the Sessions held on the 17th *January* following; consequently four weeks have not expired from the first notice of the order to its confirmation. It is a matter of great importance that full effect should be given to every one of the provisions contained in the second section of this act of parliament, and there having been this material omission, it appears to us that the order of Sessions as well as the original order must be quashed.

Rule absolute.

The KING *v.* The INHABITANTS of BERKSWELL.

An intestate dies seised of a leasehold cottage, leaving his wife and three daughters him surviving. The wife obtains letters of administration, but makes no distribution of her husband's effects. The husband of one of the daughters is, with permission of the administratrix, let into possession of the cottage, and he and his wife reside therein for some years, until they become chargeable to the parish, without paying any rent, which during that time was paid by the administratrix:—Held, that the pauper had not such an estate in the premises that a court of equity would have decreed a conveyance, and clothed him with the legal title, so as to confer a settlement by an irremoveable residence of forty days.

TWO Justices, by their order removed, *John Matthews*, from *Berkswell*, in the county of *Warwick*, to *Holy Trinity*, in the city of *Coventry*, and upon appeal the Sessions quashed the order, subject to the opinion of this Court on the following case:—

Previous to the residence in *Berkswell*, hereinafter mentioned, the pauper was settled in *Holy Trinity*. In 1808, under the provisions of an Inclosure Act, a lease for thirty-one years was granted by the lady of the manor, to one *Thomas Hands*, of a cottage, situate in *Berkswell*, at the annual rent of one shilling. *Hands* was residing in the cottage at the time of the lease, and continued to do so afterwards for upwards of a year, when he died intestate, leaving a widow and three daughters, one of whom was married to the pauper. Letters of administration were granted to the widow, but no distribution made of the intestate's effects. After the death of *Hands*, his widow lived in the cottage for about two years, and upwards; one of the other daughters with her husband resided there, for two or three years more, and then the pauper and his wife came and resided there for some years, and until the period of their removal, with the permission of the widow, she occasionally helping them, and always paying the annual rent of one shilling reserved by the lease. The pauper never paid any rent, either to the widow or the lady of the manor. The question was, whether by such residence the pauper gained a settlement in the parish of *Berkswell*. The Sessions, subject to the opinion of this Court, thought that he did, and quashed the order.

*Scarlett* and *Reader*, in support of the order of Sessions, contended, that the pauper had such an equitable estate in the premises in question, that a Court of Equity would have decreed a conveyance and clothed him with the legal title.

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and therefore his residence for forty days gained him a settlement, upon the principle that a man cannot be removed from his own estate. It might be true that the widow of *Hands*, upon his death, had the legal estate vested in her, but still it must be considered as subject to the statute of Distributions, 22 & 23 *Car*. 2. c. 10, under which she would have only a right to one third, the remaining two thirds being vested in her daughters, one of whom the pauper married. He therefore had an equitable interest, and a Court of Equity would have decreed a conveyance and clothed him with a legal title. Upon this principle he was irremoveable for forty days, and therefore gained a settlement. They cited *Rex* v. *Natland* (a), as an authority in point. In that case one of several persons entitled to a distributive share under a bequest in a will of property, (thereby expressly devised to be sold, and the proceeds divided,) having resided before, he was considered irremoveable during that time, and consequently gained a settlement. There was no sound distinction between that case and the present, and as the pauper had an equitable interest in this property, it followed that he was settled in *Berkswell*.

*Nolan*, (with whom were *Holbech* and *Goulburn*,) contrà. The pauper's residence was under a mere parol licence to occupy, and he had not such an equitable estate, that a Court of Equity would have decreed a conveyance and clothed him with a legal title. Here *Hands*'s widow being adminisiatrix had the legal interest in the premises, and she alone could gain a settlement, and not any person who might be beneficially interested in the distribution of the intestate's estate by force of the statute. The point decided in *Rex* v. *Natland*, was merely, that the opinion of a Judge of assize, is final on a case referred to him by consent of the parties, but the Court did not go into the question upon which the opinion of the single Judge was given. *Rex* v. *Standon* (b), clearly recognizes the principle upon which this case is to

(a) Burr. S. C. 793.

(b) 2 M. & S. 467.

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be decided, where Lord *Ellenborough* draws a distinction between a legal or equitable estate, and a mere licence by parol to occupy; and *Le Blanc*, J., held, that a man must have such an equitable estate, as would be perfected in him by the intervention of a Court of Equity to enable him to gain a settlement. In *Rex* v. *Widsworthy* (*a*), which case is recognized in *Rex* v. *Cold Ashton* (*b*), and *Rex* v. *North Curry* (*c*), it was held, that one of several, entitled in distribution, and not the administrator, by a residence of forty days upon part of the intestate's estate, did not acquire a settlement. Although in *Rex* v. *Horsley* (*d*), it was decided, that a *sole* next of kin, residing, gained a settlement, Lord *Ellenborough* drew the distinction, that she was at any time entitled to be clothed with the legal title, yet that it would be different, where several were equally entitled. The present case is distinguishable from *Rex* v. *Offchurch* (*e*), and *Rex* v. *Holm East Waver* (*f*), because in those cases the cestui que trusts, resided, with permission of the trustees. So is this case distinguishable from *Rex* v. *Wivelingham* (*g*), because there the cestui que trusts under a will, took a conveyance of the estate (directed by the will to be sold, and the proceeds divided between the pauper and three others,) and the pauper having afterwards resided, there was no doubt he thereby gained a settlement; but here the pauper's residence was merely under a parol licence, and a Court of Equity could not have given him any legal title.

ABBOTT, C. J.—I am clearly of opinion there was not an equitable interest in this case, which would have entitled the pauper to say to the administratrix, "I shall come and live in this place, and if you do not allow me so to do, a Court of Equity will enforce my title." The pauper had no such right. He was entitled indeed, in right of his wife,

(*a*) Burr. S. C. 109.
(*b*) Id. 444.
(*c*) Cald. 137.
(*d*) 8 East, 405.
(*e*) 2 Const. 500.
(*f*) 16 East, 127.
(*g*) Doug. 738. 741.

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to call upon the administratrix to give an account of the estate and effects of the intestate, but it might have turned out that she had paid much more than the value of this tenement in discharging her husband's debts, and in that case he would have had nothing.

Bayley, J.—In *Rex* v. *Toddington* (a), which is the latest case upon this head of settlement, the beginning of Lord *Ellenborough's* opinion is, I think, decisive upon this subject. His Lordship says, "This is not an estate so clearly equitable, that a court of law can presume that a court of equity would, if applied to, clothe the party with the legal right to it." That paragraph shews in what case an equitable interest shall give the party a right to be considered as gaining a settlement in right of it; and my Brother *Holroyd*, in giving his judgment in that case, says, "An equitable estate is very different from an equitable right to have a conveyance of the legal estate." In this case it seems to me, that the pauper had no right at all to go into a court of equity to have a specific portion of this estate decreed to him, or to be admitted to reside upon the premises.

Holroyd, J.—I am of opinion that the pauper, in this case, had not any equitable right to enjoy the property in question. He was entitled to his wife's share, assuming that the testator's effects were sufficient to pay it, but I think he had no right to enter and take possession of the cottage without the assent of the administratrix, nor even then, if she disposed of the possession, without reserving the powers given to the ordinary under the statute of Distributions (b).

Rule absolute for quashing the order of Sessions.

(a) 1 B. & A. 560.

(b) *Best*, J., was absent.

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## The KING v. The INHABITANTS of CHERRY WILLINGHAM.

A pauper was hired as ground-keeper, and his master agreed to give him 20*l.* a-year wages, a cottage to live in, and the joist and whole profits of one cow, for his own services, and the sum of 28*l.* and the joist and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his master's labourers. The contract being entire, and the annual value of the lands on which the two cows were depastured being more than 10*l.*: Held, that he gained a settlement by renting a tenement within the meaning of the statute.

BY an order of two Justices, *William Boulding* and his wife and children, were removed from the parish of *Hougham*, in the parts of *Kesteven*, to the parish of *Cherry Willingham*, both in the county of *Lincoln*. The Sessions, on appeal, confirmed the order, subject to the opinion of the Court upon the following case:—

Previous to the 1st *May*, 1817, the pauper, *Matthew Boulding*, had gained a settlement by hiring and service in the parish of *Cherry Willingham*, and on that day contracted to become the ground-keeper of *John Hill*, in respect of his farm at *Hougham*, on the following terms:—His master was to find a cottage on the farm for the pauper to reside in, with his wife and family, to give 20*l.* wages, and to depasture for the pauper two cows upon the farm at *Hougham*; the whole profits of which cows were to be taken by the pauper (as hereafter explained), who, in consideration thereof, and of 28*l.* per annum, to be paid to him by the master, in addition to the above wages of 20*l.*, was to maintain two servants in the cottage wherein pauper and his wife and family were to reside during the said year. The pauper resided under these terms in *Hougham* during the year, taking the whole profits of the cows, receiving his wages, the allowance of 28*l.*, and maintaining the two servants. The contract was an entire contract. The master agreed to give the pauper 20*l.* a year, a cottage to live in, and the joist and whole profit of one cow, for his own services, and the sum of 28*l.* and the joist and whole profits of another cow, in consideration of his (the pauper's) lodging and maintaining in the cottage two of his (*Hill's*) labourers. The annual value of the lands on which the two cows were depastured exceeded 10*l.*, but would not be of that value if one cow only had been kept; that

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is to say, the annual value of the agistment of two cows upon the land in question would be worth 10*l*, but if one cow not worth 10*l*. a year.

The case was argued on a former day, when

*S. M. Phillips*, in support of the order of Sessions, contended, first, that it was apparent upon the face of the case, that the pauper had no interest whatever in one of the cows, and consequently the value of the tenement, even if this could be considered as a tenement, was insufficient to confer a settlement. It was quite clear that the produce and profit of one of the cows was expressly applied to, and received by the other two servants of the pauper's master, and in no degree concerned the pauper himself. The profit indeed passed through his hands, but that was merely for the convenience and on account of his master, and not with any view to his own personal participation or benefit. But secondly, this was no tenement within the meaning of the statute 13 & 14 *Car*. 2. c. 12. It was very distinct in its nature and character from all the cases of this kind, and the Court would not strain either the law or common sense, in order to extend the principle of those cases, the operation of which had been already more than sufficiently extensive.

*Scarlett* and *Balguy*, contrà. There is a sufficient renting of a tenement to confer a settlement upon this pauper, both as respects the nature and the value of the tenement in question. There is one entire contract here between the parties. The pauper is to be ground-keeper to Mr. *Hill*, and is to discharge the duties of that situation, and to maintain two other of his master's labourers; and in payment, he is to receive a house to live in, the profits of two cows, and so much yearly wages. How can it be contended, that this is not taking a tenement within the meaning of the statute? He has the depasturing of the cows in propria jure. It has been held, that the renting a dairy, or the renting a rabbit-warren, is a good tenement, and will confer

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a settlement, *Rex* v. *Piddletrenthide* (a); that a cattle-gate is a tenement within the meaning of the statute, *Rex* v. *Whixley* (b); and that occupation, in reward of service as a herdsman upon a common, was a good renting of a tenement, *Rex* v. *Melkridge* (c); all which are much slighter cases, and much more equivocal in their nature than the present; and therefore, upon all these authorities, the tenement here is quite sufficient in its nature. Then, as respects the value, the case is equally clear in favor of the settlement. There is no distinction between the one cow and the other, as to the terms upon which they were taken by the pauper, or the manner in which the produce of them was to be applied. He was to receive the produce of both, arising in loco certo, and to apply it as he thought fit. There was no special application of any part to the maintenance of the labourers; and the pauper had precisely the same interest in the land in respect of one of the cows as he had in respect of the other. By the very finding of the case, therefore, the value is more than sufficient. If any authority were wanting upon this point, *Rex* v. *Minster* (d), is precisely in point, and is conclusive of the present case (e).

The Court took time to consider of the case, and judgment was now delivered by

Abbott, C. J.—We have considered of this case, and we are all of opinion, that the pauper has acquired a settlement in the parish of *Hougham*, and therefore that the order of removal was wrong, and the rule for quashing it must be made absolute. The tenement in question consisted in the depasturing of two cows. The case found that the annual value of the land upon which the cows were de-

(a) 3 T. R. 772.
(b) 1 T. R. 137.
(c) Id. 598.
(d) 3 M. & S. 276.
(e) Vide *Rex* v. *Sutton St. Edmunds*, ante, vol. ii. 800, and *Rex* v. *Tisbury*, 2 Nol. P. L. 17. 3d edit.

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pastured would have been under 10*l.*, if only one of the cows was kept upon it, but that it exceeded that sum if both cows were so kept. It was therefore contended in support of this order, that though the depasturing of one of the cows might be considered as a tenement, yet that that of the other could not. Now it is found, that the contract between the parties was one entire contract. The master agreed to give the pauper 20*l.* a-year, a cottage to live in, and the joist and whole profits of one cow, for his own services; and 28*l.* a-year, and the joist and whole profits of another cow, in consideration of his lodging and maintaining in his cottage two of his master's labourers. The question to be determined arises in relation to the latter cow. By the terms of the contract, the master is to have no part of the produce of either of the cows, and that produce therefore must have formed a part of the value which was to be given to the pauper in consideration of his services, and whether the pauper was to be paid in money, or in any other manner beneficial to himself, is perfectly immaterial. We therefore think, that the difference, as to the depasturing of these two cows, as collected from the terms of the contract, does not amount to any legal distinction, and we cannot therefore say, that the agistment of the latter cow was not a tenement within the meaning of the statute.

Rule absolute, for quashing the Order of Sessions.

## The King v. The Inhabitants of Hagworthingham.

The lord of a manor gave G. a licence in writing to build a house on the waste, which he built accordingly, and sold it to *B.*, who again sold it to *T.* for 30*l.* *T.* occupied the house for five years, and paid annually one shilling to the lord, and then re-sold it for 34*l.*:—Held, that *T.* did not purchase such an estate or interest, either legal or equitable, as to gain him a settlement by virtue of 9 *Geo.* 1. c. 7. s. 5.

By an order of two Justices, *Edward Turner* and *Jane* his wife, and their children, were removed from *Stainton by Langworth* to *Hagworthingham*, both in the county of

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*Lincoln.* The Sessions on appeal confirmed the order, subject to the opinion of this Court, upon the following case:—

In the year 1798, certain commissioners, in pursuance of an act of parliament for the inclosure of the parish of *Hagworthingham*, made their award, and allotted to the Earl of *Manvers*, as lord of the manor of *Hagworthingham*, an allotment as a full compensation for his right and interest in or to the soil of the open fields and commonable and waste lands within the said manor of *Hagworthingham*. In the year 1809, one *Thomas Goodwin* applied to Lord *Manvers*, through Mr. *De Brun*, his Lordship's agent, for leave to build a house upon the waste in the parish of *Hagworthingham*. Lord *Manvers* gave him in writing, full and free liberty to build a house on the place in question. *Goodwin* built there, on the waste by the road side, in the same year, a blacksmith's shop, which, two years afterwards, he sold to one *Bailey*, who sold it soon afterwards to the pauper for 30*l.* No deed of conveyance was executed to the pauper. The pauper converted the shop into a dwelling house, where he resided during five years, and then sold it to one *Wright* for 34*l.* The pauper continued to live therein, as tenant to *Wright*, for two years longer. During the five years that the pauper resided as owner of the house, he paid one shilling a-year to Lord *Manvers*, as lord of the manor. The surveyor of the highways once demanded this one shilling to be paid to him, but it never was so paid. On the pauper quitting the house, *Wright* went to live there, and it is let by *Wright* to a tenant for 2*l.* 10*s.* a-year at the present time.

The case was argued on a former day, by

*Nolan* and *Patteson*, who, in support of the order of Sessions, contended, that the pauper was the purchaser of an interest either legal or equitable for 30*l.* in the parish of *Hagworthingham*, and thereby gained a settlement, within

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the meaning of of 9 *Geo.* 1. c. 7. s. 5. They cited *Rex* v. *Butterton* (a), *Rex* v. *Calow* (b), *Rex* v. *Garway* (c), *Rex* v. *St. Mary, Whitechapel* (d), and *Rex* v. *Hornchurch* (e).

*Balguy* and *Clinton*, contrà. The pauper had no better title than *Goodwin*, and if the latter had no legal or equitable estate in the parish, no settlement was gained. Originally *Goodwin* had no more than a permissive occupation, or licence to build. He had no interest in the land, and therefore he could convey nothing to a purchaser. The pauper's title depends entirely upon the interest which *Goodwin* had, and as the latter had nothing but a bare naked possession, without title, no settlement could be gained by the pauper's purchase. They relied upon *Rex* v. *Horndon upon the Hill* (f), as being expressly in point.

The Court took time to consider the case, and

Abbott, C. J., now gave judgment.—We have considered of this case, and are of opinion, that the pauper did not gain a settlement in the parish of *Hagworthingham*, and consequently the rule for quashing the order of Sessions must be made absolute. It was contended in argument, that when a party has an estate in a parish for which he has paid an actual consideration of 30*l.*, his occupation of that estate enables him to acquire a settlement; and there was some discussion as to the nature of the estate by the purchase of which a settlement could be thus acquired. But on the authority of *Rex* v. *Horndon-on-the-Hill*, we are of opinion, that no estate or interest in the land was purchased by the pauper in this case. It appears upon the statement of the facts sent us by the Sessions, that the pauper, after his purchase, paid one shilling per annum to

(a) 6 T. R. 554.
(b) 3 M. & S. 22.
(c) Burr. S. C. 632.
(d) Burr. S. C. 55.
(e) 2 B. & A. 189.
(f) 4 M. & S. 562.

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Lord *Manvers*, as lord of the manor, during his occupation; but it does not appear that any such payment was made by the person who originally erected the building upon the waste; and therefore, though the pauper *may* possibly have acquired the character of tenant from year to year to Lord *Manvers*, he is still without any interest in the land derived either from *Bailey* or *Goodwin*, his predecessors, because their erection and occupation of the house under a licence from the lord, does not amount to any legal estate whatever. We think the present case is precisely similar to that of *Rex* v. *Horndon-on-the-Hill*, and must be governed in principle by it; and that case clearly decided, that a mere licence to build on the waste does not convey a grant of any estate in the soil, legal or equitable. The observations of Lord *Ellenborough* in that case are very decisive. He says, "We cannot take into our consideration what it may be conjectured a court of equity would determine in this case. Perhaps a court of equity might interfere, but can we say with certainty that it would? We ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a court of equity to interpose in some way or other. This was a mere personal licence. The pauper here never had a more perfect estate than the licence gave him, that is, a permission to occupy." Upon this authority, therefore, and upon the ground that there was no purchase in this case of any estate or interest in the land or the building, we are of opinion that no setment was acquired by the pauper.

Rule absolute for quashing the Order of Sessions.

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## The King *v.* The Company of Proprietors of the Manchester and Salford Water Works.

By the *Manchester* and *Salford* Paving and Lighting Act, 32 *Geo.* 3. the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, garden-ground, and other *tenements* within the same towns, are liable to be rated for the purposes of the act. Under this act the *Manchester* and *Salford* Water Works Company are not rateable as occupiers of a *tenement*, in respect of their water pipes carried under ground, for supplying those towns with water.

THIS was an appeal against a rate made by the commissioners of police of *Manchester* and *Salford*, upon certain water pipes, trunks, and other apparatus of the defendants, used by them for supplying those towns with water. The Sessions on appeal confirmed the rate, subject to the opinion of the Court, upon the following case:

The defendants are a body corporate and politic, and by stat. 49 *Geo.* 3. c. 192. s. 32. are empowered to make and maintain the necessary works and apparatus for supplying the towns of *Manchester* and *Salford* with water. They have an office and yard in the town of *Manchester*, which they rent from the owners thereof; and they have also main pipes running through many of the streets of *Manchester*, from which service pipes convey the water to the several dwelling-houses of the persons whom they supply. By sec. 55 of the same statute, inhabitants wishing to have water from the defendants' works, are authorized, with the consent of the defendants, and with the consent of the owners of the premises through which the pipes shall pass, at their own expence, to open the ground between the main pipes and their houses, and to lay down pipes communicating from the one to the other, upon payment of certain yearly rates to be agreed on. And in default of payment thereof, the defendants are authorized to remove the pipes, and to recover the arrears by distress and sale, the pipes to be restored to the persons who originally provided them. By stat. 2 *Geo.* 4. the defendants are compelled to furnish a sufficient supply of water, in the manner directed by the former acts, to every inhabitant occupying a private dwelling house, or a part thereof, in any part of the said towns, for the use of his family, at certain annual rates therein specified, and varying in proportion to the rent of the houses of

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the inhabitants, 10*l.* per annum being the maximum, and 12*s.* per annum the minimum of such rates; and when water is supplied for any other purpose than the consumption of private families, a further rate to be paid according to agreement between the parties. In practice, the service pipes are sometimes put in by the company's plumber, and sometimes by the persons who receive the water. Sometimes the tenant bears the expence of the service pipe from the main pipe to his premises, and sometimes the Company pay it for him, and charge him a per centage in addition to his water rate; but the tenant always bears the expence of the pipe within his own premises. The Company have stop cocks in the different streets, to regulate the direction of the water, and in case the consumers do not pay their water rate, the Company may, and sometimes do, withdraw the supply, by cutting off the service pipes. By 32 *Geo.* 3. (an act for cleansing, lighting, and watching the streets of *Manchester* and *Salford*) certain commissioners are (by sect. 39) authorised once in every year to ascertain the sums to be raised by rates or assessments upon the inhabitants, " and to raise such sums by rates or assessments upon all the tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, and other buildings, gardens, garden-ground, and other tenements, situate, standing, lying and being within the said towns respectively, according to the annual rent or value of the same respectively." In pursuance of this clause, the Company were duly rated in respect of their office and yard in *Manchester*, in which assessment they have acquiesced; they were also further rated " in respect of your pipes, trunks, apparatus, works and tenements in the township of *Manchester*, for and concerning the conveyance and supply of water in that township, and the profits arising therefrom in the same township, 33*l.* 15*s.*" The Company have no property in the township of *Manchester*, except that specified in the assessment: their reservoirs, engines, and engine-houses being in the township of *Beswick*.

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Against this latter assessment the Company appealed. The Sessions were of opinion, that the defendants were, under the above circumstances, to be considered as beneficial occupiers of the pipes, &c. mentioned in the assessment, and confirmed the rate.

This case was argued before *Bayley*, J., *Holroyd*, J., and *Best*, J., at the Sittings held at *Westminster* after last *Hilary* Term.

*J. Williams*, *Starkie*, *Armstrong*, and *Courtenay*, argued in support of the order of Sessions, and cited *Rex* v. *The Rochdale Water Works* (a), *Rex* v. *Macdonald* (b), *Rex* v. *Nicholson* (c), *Rex* v. *Bell* (d), and *Rex* v. *Jolliffe* (e).

*Coltman* argued contrà, and cited 2 *Rol. Ab.* 57. l. 7. 12. *Com. Dig.* tit. *Tenement*, E. 2. *Rex* v. *Bell*. *Rex* v. *Jolliffe*. *Hollis* v. *Goldfinch* (f). *The Duke of Newcastle* v. *Clark* (g). *Atkins* v. *Davis* (h). *Stanley* v. *White* (i), and *Rex* v. *Bath* (k).

*The Court* took time to consider the case, and the judgment was now delivered by

Bayley, J.—The question raised for the opinion of the Court in this case was, whether the Company, in respect of their pipes, trunks, and other apparatus for supplying the towns of *Manchester* and *Salford* with water, were liable to the payment of rates, under the 32 *Geo.* 3., as the occupiers of the water-way; or, in other words, whether their occupation of that water-way was to be deemed a tenement within the meaning of that act. By the 39th section of that

(a) 1 M. & S. 634.
(b) 12 East, 324.
(c) Id. 330.
(d) 7 T. R. 598.
(e) 2 T. R. 90.
(f) Ante, vol. ii. 316.
(g) 2 J. B. Moore, 666.
(h) Cald. 315.
(i) 14 East, 332.
(k) Id. 609.

act, "the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, garden-ground, and other tenements," are made liable to be rated. It does not adopt the language of the 43 *Eliz.* c. 2, "land and houses," but it confines itself to the various kinds of property which I have specified; the word "land" is no where to be found, but the word "tenement" is used; and therefore the decisions upon the statute of *Elizabeth* will not apply to the present case, unless the word "tenement" here used, is to be construed as equivalent to, or comprehended in, the word "land." This is an act "for cleansing, lighting, watching, and regulating, the streets, lanes, passages and places within the towns of *Manchester* and *Salford*, and for widening and rendering more commodious, several of the said streets," &c. One of the chief objects of the act, therefore, was clearly to provide for the proper security, peace, and accommodation of persons dwelling in and passing along these towns, and the rate is to be made upon those persons, namely, upon "the tenants or occupiers of any messuage," &c. there situate. It is observable, that wherever the word "tenement" occurs in the act, it is invariably associated with some other term denoting a *building* of some kind or other. In the 39th section, which directs the commissioners to ascertain the sums to be raised by rates or assessments, and enumerates and describes the persons upon whom these rates are to be made, the word "tenement" occurs; but in what connexion? "Other buildings, gardens, or garden-ground, and other tenements." By the 40th section, the demand of the rate is to be left at "the dwelling-house or tenement" occupied by the person rated. The 41st section recites, that "several messuages, dwelling-houses, &c. in the town, are let out in lodgings and tenements to different tenants," and provides, that "every such messuage and dwelling-house, or tenement," shall be liable to a rate. These are the principal instances in which the word "tenement" is used in the course of the act, and

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from these instances, considering the manifest object of the act, and the association in which we find this word, we are to consider in what sense the legislature intended to use it, and how it ought properly to be applied. The constant omission of the general and obvious word "land," and the introduction of the terms "gardens or garden-ground," clearly imply that *land in general* was not intended to be made the subject of the rate. The object of the act was to give protection and security to the inhabitants in their persons and their property; and therefore houses, and any species of property appertaining to residency and to trade, are carefully enumerated, and are reasonably made the subjects of the rate, because they partake of the benefit afforded. But why were gardens and garden-ground to be included, if land in general was not? For this very sensible reason: garden-grounds in the immediate vicinity of a large and populous town are an extremely valuable species of property, and are also extremely open to depredation and injury, and the improvement in lighting and watching these towns would be the means of affording very important protection to property of that nature in their neighbourhood, and would therefore properly render such property the subject of charge. Gardens and garden-ground, therefore, with reference to this act of parliament, are properly distinguishable from land; while land in general, and particularly pasture land, and other species of real property, such as are included under that general denomination, are as properly comprehended in the statute of *Elizabeth*, as affording large incomes to the proprietors, and consequently supplying the means of contribution towards the public expenditure. But these latter kinds of landed property are omitted in this act of parliament, because they can derive no important protection or equivalent advantage from the improvements which it is the object of the act to effect. We are therefore of opinion, that the word "tenement," as used in this statute, is not equivalent to the word "land" in the statute of *Elizabeth*, and that the property in question is not a

"tenement" within the plain and fair meaning of the legislature in this statute, and consequently is not liable to the payment of this rate. For these reasons we think that the order of Sessions confirming the rate upon the defendants, must be quashed. 1823. The King v. Manchester Water Works.

Order of Sessions quashed.

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ENGLISH *v.* CABALLERO, and Wife.

THE defendant's wife having been arrested alone, upon a bill of *Middlesex* issued against both, for a debt contracted by her before marriage, a rule nisi was granted on a former day, for quashing the writ, upon an affidavit of the husband, stating that before and at the time the writ was issued, he was in the actual employment of his Excellency the ambassador of his Majesty the King of *Spain* to this country, who had been acknowledged and received as such) as second secretary to the said embassy, and that his employment as such secretary consisted in writing dispatches and other official documents and communications for his said Excellency, in which deponent had, since his residence in this country, been constantly employed, and was in daily attendance upon his said Excellency; and that deponent was not a trader in this country within the intent and meaning of the laws relating to bankrupts,

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the Court refused to quash the writ, though the husband swore that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him in writing dispatches and other official documents,

*Campbell* now shewed cause, and contended, first, that the rule sought too much, in requiring that the writ should be quashed, even supposing the defendant and his wife to be protected by the stat. 7 *Anne*, c. 12. because the writ was still good as serviceable process; and second, that the affidavit upon which the rule was obtained, was insufficient to entitle the defendant to his privilege. It was defective in several particulars. The name of the ambassador was not mentioned; it did not state that the defendant was a domestic servant of the ambassador, nor when he was first em-

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ployed, nor that he was employed in the Ambassador's house. But independently of these defects, the husband did not come within the reason of the privilege, because it was the wife only who was arrested, and she might be bailed without any inconvenience to the husband. He produced an affidavit that the defendant's wife was an *English* woman, and was possessed of property in her own right exceeding 1000*l.* per annum. Under such circumstances, this being a case of considerable suspicion, such an application was not to be encouraged.

*Tindal*, contrà, contended, that the rule was properly framed for the purpose of quashing the writ, inasmuch as the statute (s. 3.) declared that the writ, if improperly issued, should be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever. Then as to the affidavit, he insisted, that it was sufficient, in stating positively that the husband was in the actual employment of the *Spanish* ambassador, as second secretary, and that he was in daily attendance upon his Excellency, in the discharge of the duties of his situation, and consequently he came expressly within the principle of the act, and of decided cases. It might be true, that the husband himself was not arrested, but being liable for his wife's debts, he was virtually affected by the proceeding, and was entitled to the relief which the statute afforded.

Abbott, C. J.—I am of opinion that the affidavit is not sufficient to call upon the Court to quash the writ. If the husband shall be arrested, he may relieve himself by making a better affidavit. In his present affidavit, he has not stated that he is a domestic servant, nor does he state any thing to shew that he is within the reason of the privilege. The affidavit merely states, that for some time previous to the issuing of the writ, he was in the employment of the ambassador, as second secretary, and that as such secretary, his employment consisted in writing dis-

patches and other official documents and communications, and that he was in daily attendance upon his Excellency; but he does not state when he was first employed, when the ambassador came to this country, nor does he say that he is employed in the ambassador's house. These are defects which we are bound to attend to; particularly when there are strong circumstances of suspicion suggested on the other side.

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HOLROYD, J. (a).—I am of opinion that the defendant does not bring himself within the statute. There is no service stated at the ambassador's house. It does not follow, nor is it to be taken for granted, that the writ is absolutely void because it has issued, unless put in force by an arrest; and the plaintiff may not choose to arrest the husband.

Rule discharged (b).

(a) *Bayley*, J., and *Best*, J., were absent.

(b) Vide *Novello* v. *Toogood*, ante, vol. ii. 833. *Hopkins* v. *De Roebeck*, 3 T. R. 79. *Flint* v. *De Loyant*, M. 42 *Geo.* 3. 3 Burr. 1676. 4 Id. 1481.

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ELLIS, Clerk, *v.* ARNISON (a).

In covenant for not setting out tithes of certain garden-ground, defendant pleaded an inclosure act, by which the plaintiff received an allotment of waste lands in the parish, in lieu of tithe, but omitted to allege that the commissioners under the inclosure act had made their award in pursuance thereof, and after a finding for the defendant by the Jury upon an issue of fact, the Court entered judgment for the plaintiff non obstante veredicto.

COVENANT upon a lease of the small tithes of certain garden-ground in the parish of *East Moulsey*, in the county of *Surrey*. The defendant pleaded non est factum, and several special pleas founded upon an inclosure act for inclosing the waste of the said parish, of which plaintiff was perpetual curate, and whereby a certain portion of the waste was allotted to him in lieu of all tithes. To one of the special pleas there was a demurrer, and judgment thereon for the plaintiff; and upon another plea, containing an issue of fact, the Jury upon the trial found for the defendant-

(a) Vide ante, vol. ii. 161.

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practice of this Court cannot declare de bene esse upon process returnable the *last* return of the Term. It is clear, that declaring de bene esse is only under the authority of a rule of Court, T. 22 *Geo.* 3. The rule of this Court allows a plaintiff to declare de bene esse upon process returnable the first or second return of any Term. It is contended, that although that rule is thus expressly worded, still the plaintiff may declare de bene esse upon process returnable on a later day, and that the rule may be so construed as to give such a permission. I cannot, however, see that it was the intention of the Court, that the party should have liberty to declare de bene esse upon process returnable the last return of the Term. In C. P. there is an express rule, in terms authorising the party to declare de bene esse upon process returnable the last return. Whether it may be expedient to alter our practice in this particular by a new Rule of Court, is a matter for future consideration of the Judges, but at present we are to expound the rule as we find it laid down by our predecessors.

Bayley, J.—I am of the same opinion; and I think it would not be desirable to introduce a new rule, unless it was also expedient to lay down a rule that the defendant's plea must be of that Term in which the process is returnable; and if this were to be the case, where the process is returnable on the last return, it would be productive of great inconvenience to the defendant. I think the rule respecting declarations de bene esse was never intended to apply excepting in those cases where the plaintiff is entitled to a plea of the Term in which the writ is returnable. I observe that in the case of *Abbey* v. *Martin*, the Court do not give any reasons for their decision, but state shortly that the proceedings were regular. There is very good reason why a plaintiff should be entitled to declare de bene esse if the writ is returnable on any other return day except the last, because in a country cause, he may be in a situation to try at the ensuing assizes; and if it is a town cause, he may be in a situ-

ation to try at the first sittings in the succeeding Term; but not so if the writ is returnable on the last return.

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HOLROYD, J.—It appears to me that the plaintiff cannot declare de bene esse where the process is returnable on the last return of the Term. In C. P. the plaintiff can try at the Adjourned Sittings, which cannot be done in this Court.

Rule absolute (a).

(a) See Com. Dig. tit. Pleader C. 1. 2. 3. Cas. Pr. C. P. 16. Pr. R. Reg. 145. R. T. 8 *Geo.* 3. C. P. 3 Smith R. 351. 12 East, 116. Cas. Pre. C. P. 68. Tidd, 350.

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MORLAND *v.* WESTON.

After declaration, plea, and issue which was joined in *Trinity*, defendant on 6th *November* gave a cognovit for the debt and costs, and on the 11th, surrendered in discharge of his bail. In *Hilary*, plaintiff entered up final judgment:—Held, that in *Easter* he might charge the defendant in execution, though the latter might have been previously supersedeable.

THE defendant being in confinement in the *Middlesex* House of Correction, under sentence of this Court for a misdemeanor, was brought up by habeas corpus, to be charged in execution in an action at the suit of the plaintiff, under the following circumstances:—A declaration was delivered in *Easter* Term, 1822, and there was a plea and issue thereon, in *Trinity*. A negociation then took place between the parties for a cognovit, which was given on the 6th *November* last, and on the 11th of that month the defendant surrendered to the custody of the marshal in discharge of his bail. The plaintiff did not enter up final judgment until *Hilary* Term last, and now in *Easter* Term (the defendant having been removed from the custody of the marshal to the *Middlesex* House of Correction on the 4th *December* last) proposed to charge the defendant in execution, and the question was, whether he was at liberty so to do by the practice of the Court.

*F. Pollock*, for the defendant. It is quite clear, that by the practice of the Court, if a trial of the cause had been had at the Sittings fter *Trinity*, the plaintiff might have

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proceeded to judgment and execution within Michaelmas and *Hilary* Terms. The question is, whether a cognovit, given in lieu of a trial, which would have enabled the plaintiff to enter up judgment, and take out execution in the same way as if a trial had been had, allows him to place himself in a different situation, because no trial has been had. If giving a cognovit be equivalent to a trial, the plaintiff should have caused the defendant to be charged in execution within two Terms next after the surrender, of which two Terms the Term of surrender is one (*a*). The defendant, therefore ought to have been charged in execution in *Hilary*, and the plaintiff having neglected so to do, he was supersedeable, and cannot be now charged in execution; the rule being—once supersedeable, always supersedeable. He might have been superseded in *Hilary* vacation, but having been removed from the custody of the marshal to the House of Correction in execution of a sentence of this Court, he did not think it necessary.

*Wightman*, contrà, was stopped by the Court.

PER CURIAM.—We are of opinion that this defendant was not supersedeable for want of being charged in execution. Perhaps he might have been supersedeable for the plaintiff's neglect in not proceeding to sign final judgment, but not so for want of being charged in execution. The plaintiff signed final judgment in *Hilary* Term, and he had the whole of *Easter* Term to charge him in execution, but it is no reason for not charging him in execution, that he might on a former occasion be supersedeable. It is expressly laid lown in *Tidd*, that under these circumstances a defendant may be charged in execution.

Defendant was then charged in execution, and remanded to his former custody.

(*a*) Tidd, 426..

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NUTTALL v. MARR.

An attorney's bill may be referred for taxation, after verdict for the full amount.

THIS was an action on an attorney's bill, and the plaintiff recovered a verdict for the full amount at the last Assizes for the county of *Nottingham*. On a former day a rule nisi was obtained to refer the bill to the Master for taxation, on the terms of bringing the amount of the verdict into Court within four days, but without any stay of proceedings. On shewing cause now, the question was, whether, after verdict, the plaintiff's bill could be taxed.

The COURT, with great reluctance, made the rule absolute, and observed that they were by no means disposed to encourage the practice of taxing an attorney's bill after verdict, inasmuch as it tended to create additional delay and expence. The bill ought always to be taxed before trial.

Rule absolute.

*S. M. Phillips* for the defendant, and *Balguy* for the plaintiff, who relied upon *Williams* v. *Frith* and *Hooper* v. *Till* (a).

(a) 1 Doug. 198.

PAINE v. GAWDERY.

Defendant being in custody within a local jurisdiction, plaintiff lodged a detainer against him, but discontinued the action from fear of a plea to the jurisdiction, and then arrested the defendant in this Court, without having paid his own costs of the first suit:—Held, that the defendant was not entitled to be discharged on filing common bail, the second suit not being vexatious.

ON shewing cause against a rule for discharging the defendant out of custody on filing common bail, the facts disclosed on affidavit were these:—The defendant being in the custody of the sheriff of the city of *Bristol*, plaintiff lodged a detainer against him in the City Court, but afterwards discontinued the action, from an apprehension that the defendant might successfully plead to the jurisdiction; and before the latter had been put to any expence, sued out a

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latitat in this Court, upon which he was arrested, and now detained in custody. It was alleged in the defendant's affidavit, that the plaintiff had discontinued the first suit without paying his own costs; that he had a good defence upon the merits, and that the detainer had been lodged to harass and impoverish him.

*Chitty* shewed cause against the rule, and contended, that a judgment in the inferior Court could not be pleaded in bar of this suit in the superior Court, and consequently that two suits might be going on at the same time in the two Courts, for the same cause of action; and that, as the defendant was in custody before the first detainer, he had not suffered any injury from having two instead of one lodged against him.

*Godson*, contrà, insisted that the defendant must be discharged, first, because the discontinuance of the first suit was not complete until the costs were paid; *Molling* v. *Buckholtz* (a); and second, because it was distinctly sworn, and not denied, that the detainer was lodged to harass and impoverish the defendant. *Williams* v. *Thacker* (b).

PER CURIAM (c).—Without giving any opinion as to whether the judgment in the inferior Court would be a bar to the suit in this, we think this rule ought to be discharged, on the ground that nothing vexatious has been done towards the defendant. The plaintiff finding defendant in custody, lodges a detainer against him, but being afraid of having his claim defeated by a plea to the jurisdiction, he sues him again in this Court, which we think he was at liberty to do.

Rule discharged, without costs.

(a) 3 M. & S. 153.
(b) 4 J. B. Moore, 294.
(c) *Bayley*, J., and *Best*, J., were absent.

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The KING *v.* The JUSTICES of the HUNDRED of CASHIOBURY.

*BROUGHAM* moved for a certiorari to remove a conviction under the stat. 5 *Anne* for killing game, for the purpose of having it quashed for insufficiency, there being no appeal given by the statute to the Sessions. He admitted that the objection was not apparent upon the face of the conviction, but arose upon the form of the information. Upon which

A certiorari always lies to remove proceedings under penal statutes, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute.

This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself.

The COURT said, on the authority of *Rex* v. *Liston* (a), that unless the objection appeared on the face of the conviction itself, no notice could be taken of it. And referring generally to penal statutes, they observed that this was the governing principle with respect to the writ of certiorari, and the right of appealing to the Sessions, namely, that the certiorari always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by the statute; and inasmuch as the statute 5 *Anne*, c. 14. does not give an appeal in terms, there is no mode of re-considering the adjudication of the Justices, but by removing the proceedings by certiorari, but with this restriction, that no objection can be taken unless it appears upon the face of the conviction itself, and not upon any collateral proceeding. The Court added, that if there was any substantial ground for complaint, it was still open to the party to seek redress by a motion for a criminal information.

Rule discharged.

(a) 5 T. R. 338.

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The King v. Casson and Others.

The statute 13 G. 3. c. 78. s. 80. prohibits the removal by certiorari into this Court, of any proceedings had in pursuance of that act. Where an order was made by two Justices, and confirmed by the Sessions, for diverting a a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act:— Held, that the certiorari was still taken away; and after the proceedings had been in fact removed, the Court quashed the certiorari, quia improvide emanavit, and refused to discuss the sufficiency or insufficiency of the order.

*Quære*, whether an order for diverting and turning an old road, need set out the names of the owners of the land through which the new road is proposed to be carried.

AN order of Sessions having been made confirming an order of two Justices, for diverting and turning a certain highway in the county of *Merioneth*, the proceedings were, at the instance of the defendants, returned by certiorari into this Court for the purpose of having them quashed for insufficiency. After the proceedings had been so removed, the prosecutors obtained a rule, calling on the defendants to shew cause, why the said writ of certiorari should not be quashed quia improvide emanavit, and a writ of procedendo awarded. On shewing cause against this latter rule, and a peremptory rule for quashing the orders for diverting and turning the road in question, two points were raised; first, whether the order for diverting the road was a proceeding in pursuance of 13 *Geo.* 3. c. 78. and, second, whether, assuming it not to be such a proceeding, a certiorari would lie at common law. On the face of the proceedings returned under the certiorari, the order of the two Justices for diverting and turning the old road in question, after describing the old road according to a plan annexed thereto, and pointing out a more convenient course, also described in the plan (but without naming the owners of the lands through which the new road was proposed to be carried) proceeded to order as follows: "We do hereby order, that the said highway be directed and turned through the lands, and according to the line marked A. in the plan hereunto annexed, and that the surveyors of the highways for the said parish of *Festiniog*, where the old road lies, do forthwith proceed to treat and make agreements for the recompence to be made for the said ground, and for the forming the said new road, and for the making such fences and ditches as shall be necessary, in such manner, with such approbation, and by pursuing such measures and directions, in all respects, as are warranted and prescribed by the statute made in the 13th year of the reign of his Majesty King *Geo.* 3. for the amendment and preservation of the high-

ways, and every subsequent act or acts relating thereto; and we do order an equal assessment not exceeding the rate of sixpence in the pound to be made, &c. upon all and every the occupiers of lands, &c. in the said parish, and that the money arising therefrom be paid and applied in making such recompence and satisfaction as aforesaid, pursuant to the directions of the said acts, &c." 1823. The King v. Casson.

*W. E. Taunton* and *R. V. Richards*, for the defendants. First; the order made in this case, though it purports to be a proceeding in pursuance of the 13 *Geo.* 3. c. 78. s. 19. is not so in fact, and therefore the certiorari is not taken away by s. 80, but lies at common law. Second; supposing, however, the certioriari to have issued improvidently, still, the objection should have been made on shewing cause against the rule nisi for the writ, and consequently the prosecutors are now concluded, and the Court are bound to entertain the objections for insufficiency appearing on the face of the proceedings returned from the Sessions. The first question is, whether this be a proceeding in pursuance of this act; for if it be not, the certiorari is not taken away. It clearly is not a proceeding under the statute, inasmuch as the statute requires that the names of the owners of the lands through which the new road is to be carried shall be set forth in the order. For this purpose a blank is left in the form of order given in the schedule at the end of the statute. Now this order does not pursue this direction, for it omits the names of the owners of the lands and grounds through which the new road is to be carried. It is true, it describes the situation of the place through which the road is to go, and it also directs the surveyor to treat with the owners of the lands and grounds for a compensation; but this is not sufficient, because in each case the names of the owners should be inserted, and for this obvious reason, namely, that the surveyor and the owners may come to an agreement for the recompence to be made, in order that the Justices may make an assessment upon the

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rent of the parties interested. This is an absolute order made for an assessment, whereas the statute only authorises the Justices to make a conditional order, and consequently this cannot be treated as a proceeding under this statute. If this be so, then the certiorari is not taken away, but will lie at common law. The defendants are not bound to shew upon what statute the order is founded; the onus probandi lies on the prosecutors. It is sufficient for the present argument that it is not a proceeding under the statute in question; and if it be not, then the order must be quashed for insufficiency. In *Rex* v. *Crewe* (a) decided the other day, the Court quashed the order, on the ground that it was not conformable to the statute, and was null and void. For any thing that appears, this may be an order under 55 *Geo.* 3. c. 68. s. 2, and if so, it is by force of that statute removeable into this Court, and must be quashed for insufficiency. But supposing the Court will treat it as a proceeding under 13 *Geo.* 3., still, they will not now entertain a cross motion to quash the certiorari, supposing it to have improperly issued. The usual course in these cases is to move for a certiorari in the first instance, but with a view to give the other side an opportunity of shewing cause, a rule nisi only is granted; and if there be no opposition, it is afterwards made absolute. That was the case in the present instance; no cause was shewn against the rule for a certiorari, and the Court will not now act upon an objection which ought to have been urged against the certiorari in the first instance. They cited *Rex* v. *Sheppard* (b).

*Scarlett* and *Patteson*, contrà, were stopped by the Court.

Abbott, C. J.—If this were a case in which we had clearly the power of issuing a certiorari, and the point for consideration was, whether the Court, in the exercise of the

(a) Vide ante, page 6. (b) 3 B. & A. 414.

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discretion which is ordinarily vested in it in these cases, would have granted the writ, I should have thought that the last argument urged was conclusive, and that we ought not to have granted a rule for quashing the certiorari, because the prosecutors had an opportunity of shewing cause against the rule originally obtained. But this is not one of those cases. The point here is, whether the Court has power to issue the writ; and if it appears to us, at any time, that the certiorari has issued in a case in which we had no authority, it becomes our duty to undo that which has been done, and quash it. The question, then, is, whether this be a proceeding by the Justices under the 13 *Geo.* 3. c. 78. for if it be, this Court has no power to issue the certiorari. It manifestly is a proceeding under that statute, and though perhaps it may be somewhat informal, yet it is in fact such a proceeding. The 13 *Geo.* 3. appears to be expressly mentioned by the very words of the Justices, for they direct that the matter shall be done "by pursuing such measures and directions in all respects, as are warranted and prescribed by the statute made in the 13th year of the reign of his late Majesty King *George* the 3d., for the amendment and preservation of the highways, and every subsequent act or acts relating thereto." They profess, therefore, to proceed under that act, or any subsequent act or acts relating to the subject of the order. There are no subsequent acts relating to the same subject, and therefore they are proceeding, and must be taken to be proceeding, under the 13 *Geo.* 3. Whether they have proceeded formally or informally, is a matter into which this Court has no authority to inquire, because the writ of certiorari is taken away. I am therefore of opinion, that the rule for quashing the writ of certiorari, and awarding a procedendo, must be made absolute.

Bayley, J.—I am of the same opinion. I think that part of the order which it is said, does not pursue the form

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required by 13 *Geo.* 3, by omitting to name the owners of the land through which the new road is to be carried, does not afford any foundation on which the Court is at liberty to grant a certiorari, as if this case were out of that statute. The 13 *Geo.* 3. c. 78. s. 16. is the only act which gives the Justices any power to divert and turn a road without the consent of the proprietors of the land through which the new road is to be carried; and if that be so, the order in this case must be a proceeding under the statute. But I doubt very much whether, under that act, it is an essential part of the order, that the Justices should specify the names of the owners of the land through which the road is to pass. The sec. 16. contains no intimation whatever in that respect. The form of order given in the schedule to the act, certainly does leave a blank for the names of such individuals, but the form in that respect is, in my opinion, only directory. The Justices are to point out on the plan, as they have done in this case, in what direction the road is to go. They may not know at the time when they are pointing out in what direction the road is to go, who may be the different proprietors of the land; and if it were essential to name them upon the face of the order, any mistake in that respect would be fatal; and therefore I do not go along with the argument, that if we were at liberty to look at the order in question, we should be warranted in saying that it was a different order from that which the 13 *Geo.* 3. prescribes. There might be greater weight in that part of the observation, which says that the statute only authorises a conditional order for levying a sixpenny rate, whereas this is absolute; but that would make that part only of the order void; the rest would still stand good. If any proceeding had been taken upon it, and any part of the rate had been levied before the condition was performed, the order might not be a sufficient answer to an action of trespass brought against the party who made the levy; but I have no difficulty in saying, that this is an order made under the 13 *Geo.* 3. and

the certiorari being taken away by sec. 80. of that statute, we cannot enter into the question of its sufficiency or insufficiency.

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HOLROYD, J., concurred (a).

Rule absolute for quashing the certiorari and awarding a procedendo.

(a) *Best*, J. was absent.

The KING *v.* THOMAS JENKINS.

A Spiritual Judge has no jurisdiction over the *trustee* under a testator's will; therefore, where a trustee was committed upon a writ de contumace capiendo under 53 *G.* 3. c. 127, for not exhibiting an inventory and account of the goods of a testator, the Court ordered him to be discharged.

THE defendant had been committed to *Cardigan* gaol under a writ de contumace capiendo, by the official principal of the diocese, by virtue of 53 *Geo.* 3. c. 127. and a habeas corpus having issued on a former day to bring him up to be discharged for insufficiency in the writ, he was now brought into Court, and it appeared from the writ that the defendant was committed by the Ecclesiastical Judge, upon a charge promoted by one *John James* against the defendant, as *trustee* of the last will and testament of one *Mary Davis*, for not exhibiting an inventory and account of the goods and chattels of the said *Mary Davis*, pursuant to a monition for that purpose.

*W. E. Taunton*, for the prisoner, contended, that the Ecclesiastical Court had no jurisdiction to entertain any application against a trustee, and consequently the prisoner must be discharged. Executors and administrators are certainly subject to Ecclesiastical cognizance, but over trustees the Ecclesiastical Judge has no jurisdiction. For any thing that appeared, there might be in this case an executor or administrator who was accountable in the Spiritual Court; but as it appeared from the warrant that the suit here was against the prisoner as a *trustee* eo nomine, he was clearly

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entitled to his discharge. He cited *Caudrey's* case (*a*), and *Rex* v. *Dugger* (*b*).

Notice had been given to the promoter, who did not appear to oppose the prisoner's discharge, and

The Court said, they thought the objection taken was valid. The writ did not call the defendant executor, or administrator, but *trustee*, and it was consistent with the terms of the writ that there should be an executor as well as a trustee. In the character of trustee, certainly, the prisoner was not a person over whom the Ecclesiastical Judge had jurisdiction, and he ought therefore to be discharged as to the suit in question.

Discharged.

(*a*) 5 Rep. 1. (*b*) Vide ante, vol. i. 460.



## The King v. The Mayor and Justices of Norwich.

By 10 *Anne*, the city of *Norwich*, and hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor thereof, and the guardians thereby appointed were empowered from time to time to ascertain what aggregate sums would be necessary for that purpose, and ascertain what proportion each parish, &c. should contribute, and then certify the same to the Justices, two of whom were to issue their warrant, requiring the proper officers of each parish, &c. to rate and assess the amount on the respective inhabitants; and it was provided, that if any person, parish, &c. should find himself or themselves to be unequally assessed, he or they might appeal at the next Sessions held after such *assessment made and demanded*. Where under this act the governors certified that the hamlet of *L.* ought to pay a certain proportion of an assessment made upon the whole city, and two Justices issued their warrant, requiring the collectors of the hamlet to assess that sum upon the inhabitants, and the hamlet being aggrieved by such assessment:—Held, that the churchwardens and overseers might appeal against both the certificate and the warrant thereon, as being *an assessment made and demanded*, within the meaning of the appeal clause.

THIS was a rule, obtained on a former day, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to enter continuances to the next Sessions, upon the appeal of the churchwardens and overseers of the poor of the hamlet of *Lakenham*, in the

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city and county of *Norwich*, against a certificate of the guardians of the poor in the said city and county, certifying that the sum of 5005*l.* 13*s.* 11*d.* was needful to be raised for the maintenance and employment of the poor within the said corporation, and that the sum of 286*l.* 6*s.* 11*d.* was the proportion, part, and share thereof set on the said hamlet; and also upon the appeal of the said churchwardens and overseers against a warrant under the hands and seals of the Mayor and one of the Justices of the said city, dated 6th *September* last, directed to the assessors and collectors of the said hamlet, requiring them to assess the said sum of 286*l.* 6*s.* 11*d.* upon the several occupiers of lands, and others liable in the said hamlet; and to hear and determine the merits of the said appeals.

The affidavit in support of the rule stated, that by the statute 10 *Anne*, the city of *Norwich*, and the hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor there, and that by the said act it was provided, that the Mayor, Recorder, Steward, Justices of the Peace, Sheriffs, and Aldermen for the time being, and 32 other persons, to be chosen as therein mentioned, should be constituted guardians of the poor, and become a corporation for the purpose of carrying the provisions of the act into effect, by the name of "The Governor, Deputy Governor, Assistants, and Guardians of the Poor in the said city and county of *Norwich*, and liberties of the same." By this act the guardians were empowered from time to time to ascertain what sums would be needful for the maintenance and employment of the poor within the care of the corporation, and also what proportion each parish, town, hamlet, precinct, or liberty, should raise and pay for those purposes, and to certify the same to the Mayor and Justices for the time being, which Mayor and Justices, or any two of them, were empowered to issue their warrant, and require the churchwardens and overseers of the poor of every parish, &c. to rate and assess the amount on the respective inhabitants, and on every par-

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son and vicar, and on all and every the occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and on all persons having and using stocks, *and personal estates*, in the respective parishes, &c. in equal proportion, as near as might be, according to their several and respective values and estates. And it was provided by the same act, that if any person or persons, parish, precinct, or place, should find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, might appeal to the Justices of the Peace at the Sessions held next after such assessment made and demanded. On the 6th *September* last, the guardians certified to the Justices, that the sum of 5005*l.* 13*s.* 11*d.* was needful to be raised for the maintenance and employment of the poor within the corporation from *Midsummer*-day then last past, to *Michaelmas*-day then ensuing, and required that that sum might be assessed and levied on every parish, &c. in such proportion as therein mentioned, and that the sum of 286*l.* 6*s.* 11*d.* was the proportion set on the hamlet of *Lakenham*; whereupon the Mayor and one of the Justices issued their warrant, directed to the assessors and collectors for the said hamlet, and required them to assess and rate the said sum upon the several occupiers of lands, and others liable in the hamlet, which they did accordingly. The hamlet of *Lakenham*, finding itself unequally assessed, did at the then next Sessions, in the names of the churchwardens and overseers, enter two appeals, one against the certificate of the guardians, and the other against the warrant founded thereon. The grounds of the appeals were, that the guardians, in ascertaining the sum of 5005*l.* 13*s.* 11*d.* to be raised on the several parishes in the city, had not assessed the *personal* property belonging to the inhabitants of the different parishes according to the value thereof, whereby the hamlet of *Lakenham* was rated more than it ought to be, and the occupiers of the hamlet were unequally and unjustly assessed and rated. At the same Sessions another appeal was entered, by an individual owner

and occupier of lands in the hamlet, against the rate made by the assessors and collectors, and the grounds of the appeal were substantially the same as those in the appeals entered in the name of the churchwardens and overseers. These appeals came on to be heard on the 9th *December* last, when the Sessions refused to hear the merits of the two former appeals, on the ground that no appeal would lie against the certificate and warrant, but as to the other appeal, they entered into the merits thereof, but in the result confirmed the rate and dismissed the appeal. The affidavit stated that this rule would have been applied for in *Hilary* Term last, but the application was delayed in consequence of information from the clerk of the corporation of guardians, that a committee had been appointed to revise the assessment, which, however, never in fact took place.

*Marryat* and *E. Alderson* now shewed cause, and contended, that this rule must be discharged on three grounds; first, that no appeal was given by the statute to the churchwardens and overseers against the certificate of the corporation, or the warrant of the Justices, but was confined solely to the rate upon the inhabitants when *made* and *demanded*, under the authority of the Justices' warrant; second, that supposing the appeal to lie, the prosecutors had had all the benefit of the appeal by the individual inhabitant of the hamlet, and consequently the Sessions ought not to be called upon to hear the appeal over again; and third, that the prosecutors had now come too late in their application for a mandamus. As to the first point, it was obvious from the terms of the appeal clause, that the appeal was only intended to be given to the inhabitants, against the rate assessed by the collectors and assessors of the parish, and that no appeal lay at the instance of the churchwardens and overseers against the certificate of the corporation, or the warrant of the Justices. The words of the appeal clause were, "And it is provided that if any person or persons, parish, precinct, or place, shall find him, her, or themselves, to be unequally taxed or

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assessed, he, she, or they, or such parish, precinct, or place, may appeal to the Justices of the Peace, at the Session to be holden next after such assessment *made and demanded.*" The words "made and demanded," manifestly shewed that the appeal was given only against the parish rate when imposed under the authority of the Justices warrant, and could not be construed to apply to the certificate or the warrant, because neither of them by itself could be called a rate or assessment. The words "made and demanded" had no sensible meaning with reference to the certificate and warrant, which could have no operation until a rate was afterwards made on each parish. The natural construction of the clause was to confine it entirely to the rate made on the parish, and unless this interpretation was given to the appeal clause, the most inconvenient consequences might ensue; for if it were competent for any of the numerous parishes in the city of *Norwich*, to appeal against the certificate, it might have the effect of quashing the assessment for the whole of the city, and the poor would be left wholly unprovided for, until a new rate could be made. This case was not within the 49 *Geo.* 3, which authorizes the Sessions to amend the rate, and as the corporation had no power to collect a rate, de bene esse, the poor of the whole city would be left without relief, if the objection to the rate in question were valid. The objection to the rate was, that in the original assessment all the personal property in the different parishes were not included. So that as long as the smallest portion of personal property was omitted in the assessment, it would be a ground for quashing the whole assessment upon all the parishes, and the poor would be absolutely without relief until the assessment was free from such an objection, an objection which would be continually arising from the fluctuation of property of that description. If one out of forty different parishes happened to be charged too high, that would be a ground for setting aside the rate for the whole city and county of *Norwich*, which was a proposition that could hardly be maintained. The utmost extent to which the right of appeal given by this clause

could be carried, would be to hold that the appeal lay only from one parish, against the rate of another, and not to carry it to the mischevious extent suggested. This construction would give each parish all the advantage to which it was reasonably entitled. The Court must be satisfied that the words "made and demanded," applied equally to the certificate and warrant, as to the rate assessed upon the individual parishes. In the first place, the certificate could not be called an *assessment*, and in the second the mere issuing of a *warrant*, could not be considered as a *demand*, and therefore, there was nothing to satisfy those words of the appeal clause, but the rate made by the assessors and collectors under the authority of the Justices warrant. At all events the rate in question could not be quashed unless it was unequal upon the face of it, *Rex* v. *Hardy* (*a*), and *Rex* v. *Lakenham* (*b*). Then, secondly, these parties had had all the benefit of an appeal upon the merits of the rate, because the individual occupier mentioned in the affidavit, had been heard upon the merits of his appeal, the grounds of which were the same as those upon which the two appeals of the hamlet were founded, and no advantage could be gained in calling upon the Sessions to hear the same question discussed over again. But thirdly, this application for a mandamus, was at all events too late in point of time, nor was the reason suggested in the affidavit for the delay, sufficient to remove the objection. To allow the appeals at so advanced a period, would be productive of great inconvenience, and perhaps hardship, for the money collected under the rate had been, in the necessary course of things, expended, and it would be difficult to say in case the appeals were allowed, who were the persons responsible for any surplus which might have been assessed. Besides which it was contrary to the practice of the Court, to entertain this application, inasmuch as it should have been made in the Term next after the cause of complaint arose.

(*a*) Cowp. 579. (*b*) 1 Const. 116, pl. 140.

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*Nolan* and *H. Cooper*, contrà, were stopped by the Court.

Abbott, C. J.—If an appeal be given by the act of parliament to the parish in the instances in which these appeals were made, we are bound to give effect to the act, notwithstanding the inconveniences which may arise from such a proceeding. It is for the legislature to remedy those inconveniencies if they exist. I am of opinion that the appeal is given in this case. The governors and guardians are in the first place, to see how much money will be wanted for the maintenance of the poor of the several united parishes of the city. Having ascertained to a certain extent the sum which will be wanted among all the parishes, they are in the next place to ascertain how much of the aggregate sum is to be raised on each, and they are to certify the share of each, to the Justices, and the Justices are to issue their warrant to raise the sum required. As soon as that has been done, the assessors and collectors of each parish are to raise the sum by a rate among all the inhabitants, in the same manner as a poor rate is usually raised. This is the express provision of the statute. Then comes the appeal cause, which declares, "that if any person or persons, parish, precinct, or place, shall find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, may appeal to the Justices of the Peace at the Sessions to be holden next after such assessment made and demanded." That clause, in express terms, gives an appeal not only to any individual who may be aggrieved by being rated more than his neighbour, but also to any parish, precinct, or place, which may be unequally taxed or assessed by comparison with other parishes. Now, although the words "assessment, made and demanded," taken by themselves, more naturally apply to the appeal by particular individuals, after the assessment made and demanded, yet in order to give effect to the plain language of the legislature, the parish, precinct, or place, may

also appeal. We must give effect to the words of the clause, by considering the manner in which the apportionment of the sum is to be made upon each parish, and treat the certificate of the guardians, and Justices warrant thereon, as in law an assessment made and demanded upon the parish. I am of opinion, therefore, that by this clause an appeal is given to this hamlet, and I think it would be most unjust if an appeal were not given to any parish, precinct, or place, under the circumstances of this case. The next objection is, that the merits of these appeals have already been heard and decided through the medium of the appeal of an individual inhabitant of the hamlet; but I do not think that a sufficient ground for refusing the mandamus. If it is considered a sufficient answer to the mandamus it may be made matter of return to the writ. The last topic urged is, that this application should have been made to this Court sooner. Upon comparing the affidavits on the one side and on the other, there appears to have been some misunderstanding between the parties, in consequence of which, the prosecutors had forborne to apply until *Hilary* Term, which they should have done, and I think that is a sufficient reason for the delay. This rule therefore must be made absolute.

Bayley, J.—I am of the same opinion. When we look to the act of parliament we find that two assessments are to be made, and the whole fallacy of the argument turns upon that circumstance. In the first place the guardians are to make an assessment of an aggregate sum for the whole city, and then subdivide it amongst the different parishes, and when they have done that, they are to make a communication to the mayor and Justices, who are then to call upon the proper officers to make a second assessment upon each parish. That assessment is made upon the different individuals who reside in the parish, precinct, or place on which the particular quota is to be levied. Great injustice might be done by throwing a greater proportion

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of the burthen upon one district than upon another, or by throwing upon an individual more than his neighbour. Now the appeal clause comes immediately after that clause which authorizes both the assessments in question. If then the appeal clause, which comes by way of proviso immediately after that which refers to both assessments, the operation of it must be co-extensive with the enacting clause to which it applies. The terms of the appeal clause cannot be satisfied, unless we hold that it gives the power to the parish, precinct, or place, of appealing against the first assessment made by the guardians, in case they shall be aggrieved by a greater portion of the rate than they are entitled to bear. As to the mischiefs that would be likely to result from this construction of the appeal clause, I think they need not necessarily arise, because, if the Sessions are of opinion that a particular parish has more or less than its due proportion of burthen, they may on that ground order the objectionable part of the rate to be quashed, and direct the proper proportion to be levied; for there are words in this act of parliament, which give a distraining power to the Quarter Sessions. Though they are not authorised to quash the rate by any specific directions given to them for that purpose, yet they have full power and authority to give such redress, and make such orders as to them shall seem reasonable. If they find that there has been a heavier portion of the rate thrown upon one parish in consequence of another parish not having been rated to the extent that it ought to be, there is no doubt they may give relief. For these reasons it seems to me, from the plain words of the act, it is impossible to doubt that this appeal clause applies to both assessments.

Holroyd, J.—I think the appeals in question are within the words and spirit of the appeal clause, which cannot be construed to exclude the general assessment, but must include the parish, precinct, or place, aggrieved by that assessment. The question is not whether the Sessions

may quash the rate, but if they have authority so to do, that is no reason for excluding the right of appeal.

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Rule absolute (a).

(a) *Best*, J., was absent.

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## Axon *v.* Dallimore and Another.

Assumpsit for use and occupation is a cause of action within the jurisdiction of the *Bath* Court of Requests; and a defendant occupying a warehouse in that city, though he does not personally reside, is entitled to be sued within the local jurisdiction for a debt under 10*l.* arising out of the limits thereof.

ASSUMPSIT to recover 9*l.* 16*s.* 3*d.* for the use and occupation of a stable, and for goods sold and delivered. At the last Assizes for *Somersetshire*, the plaintiff recovered a verdict for 1*l.* 16*s.* On a former day a rule was obtained, calling upon the plaintiff to shew cause why upon payment of that sum, pursuant to the city of *Bath* Court of Requests Act, he should not be restrained from taking out execution for his costs. It appeared from the affidavits that the cause of action arose out of the jurisdiction of the *Bath* Court of Requests, but that the defendants, who were carriers, occupied a large warehouse, yard, and stables, in the city of *Bath*, where their business was conducted, and that one of them kept a booking office and resided on the premises, for the more convenient management of their trade. The *Bath* Court of Requests Act, 45 *Geo.* 3. c. 67. s. 16, gives the commissioners therein named jurisdiction to decide and determine all disputes and differences between party and party, for any sum not exceeding 10*l.* in all actions, or causes of debts for rent upon leases, articles, or securities, and in all causes of assumpsit. By sec. 17, the commissioners are prohibited from determining the right or title to any lands, tenements, or hereditaments, or real estates whatsoever, or to decide on any debt, where the title of a freehold, or lease for years of any lands, tenements, or hereditaments, or of any chattels real shall be brought into question. By sec. 12, power is given to any person, whether resident or not within the jurisdiction of the Court,

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having any debt, or debts on the balance of accounts or otherwise however, not exceeding the value of 10*l.* due or owing to him, by or from any person or persons whatsoever, residing or being within the said city, or the liberty or precincts thereof, or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, or stand, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same, to apply for a summons against such debtor, &c.; and by sec. 47, if any action or suit for any debt recoverable by virtue of the act in the Court of Requests, shall be commenced in any other Court whatever, or elsewhere than in the said Court, the plaintiff in such action shall not by reason of a verdict for him or otherwise, be entitled to any costs whatsoever, &c.

*Abraham* now shewed cause against the rule, and contended, first, that this being an action for the use and occupation of a stable, it was by the fair construction of the prohibitory clause, s. 17, excluded from the jurisdiction of the Court of Requests; and, second, that the mere occupation by the defendants, of a warehouse in the city of *Bath*, was not sufficient to bring them within the protection of the statute.

*Wilde*, contrà, was stopped by the Court.

Per Curiam.—This rule must be made absolute. The case comes within both the letter and the spirit of the statute. First, this is an action of assumpsit, and the commissioners have jurisdiction over all causes of assumpsit, and there is nothing in this case to bring it within the operation of the prohibitory clause. Second, the defendants are clearly the occupiers of a warehouse, stable, and other premises in the city of *Bath*, and supposing it to be doubtful whether either of them actually resided in the city, still the terms of the 12th section are so comprehensive, as to

leave no room to doubt, that these defendants ought to have been sued in the local jurisdiction.

Rule absolute (*a*).

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(*a*) See *Spencer* v. *Holloway*, 15 East, 647. *Baildon* v. *Pitter*, 3 B. & A. 213. *Parker* v. *Elding*, 1 East, 352, and *Croft* v. *Pitman*, 1 Marsh. 269. S. C. 5 Taunt. 648.

## PASHLEY *v.* POOLE and Another.

A plaintiff declared in assumpsit against trustees of a turnpike road *generally*, went to trial, withdrew his record, and after suffering himself to be non prossed, sued the same trustees a second time *by name*, for the same cause of action, and the Court refused to stay the proceedings in the second, until the costs of the first action were paid.

THIS was a rule calling on the plaintiff to shew cause why the proceedings should not be stayed until the costs of a former action were paid. It appeared from the affidavits that the plaintiff had declared and proceeded to trial in an action for work and labour against the trustees of the *Kilburne* turnpike road, without naming any individual defendant or defendants. At the trial the record was withdrawn, and judgment of non pros was afterwards signed with the plaintiff's consent and the costs were taxed at 54*l.* 10*s.* Before the costs were paid, the plaintiff commenced another action against the present defendants, who are two of the trustees of the same road, for the same cause of action, and the question was, whether he could proceed until the costs of the former were paid.

*Reader*, on shewing cause, was stopped by the Court, and

*E. Lawes*, contrà, contended, that under the circumstances of the case, the plaintiff ought not to be permitted to proceed until the costs of the former action were paid. He insisted that this second action was vexatious, and brought for the purpose of putting a public body to unnecessary expence. In ejectment causes, it was a matter of course to compel a plaintiff to pay the costs of a first action before he was permitted to proceed to a trial of a second, upon the same title; and latterly the Court had been dis-

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posed to extend the same equitable principle to other cases. Here the second action was for the same cause. The plaintiff had failed in the first in consequence of his own blunder, and it was but reasonable that he should be called upon to pay the costs of that action before he was allowed to go on with the second.

ABBOTT, C. J.—The present is an action brought for the recovery of a debt. It is not an action complaining of a malicious arrest, prosecution, or trespass, in which cases the Court might be disposed to compel a plaintiff to pay the costs of a first action, before he was allowed to proceed in the second. This is an action for a pecuniary demand, alleged to be due from the defendants to the plaintiff, and we should be very careful before we deprived a party who has a debt owing to him, of the right of proceeding in his second action. If we saw clearly that he was proceeding in the second vexatiously, we should prevent him from so doing until he paid the costs. But here it appears that the first action was non-prossed in consequence of the plaintiff's declaring against the defendants generally as trustees, instead of by name. He discovers the names of the trustees, and sees that there is no use in going on to trial, because, if a verdict was recovered, the judgment might be arrested. I see no reason therefore, and I know of no authority for saying, that in a case like this, we ought to compel the plaintiff to pay the costs of the first action before he is allowed to go on with the second.

BAYLEY, J.—There is no general rule by which a plaintiff is compelled to pay the costs of a first action, before he is suffered to proceed with the second. If that were a general rule, it might in many instances work injustice, for the defendant might not be able to pay the costs, and the only means of paying them might be by recovering his debt.

HOLROYD, J., concurred.

Rule discharged, without costs.

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*MARRYAT* on a former day obtained a rule to shew cause why the return to the first writ of exigent, and to the writ of proclamations, and also why the writ of allocatur exigent, and the subsequent proceedings to outlawry in this cause, should not be set aside with costs, for irregularity. The facts disclosed on the affidavits in support of the rule were these:—The first writ of exigent, being tested on the 15th *May*, 1822, and returnable three weeks of the *Holy Trinity*, (23d *June*) issued into *London* on the 19th *June*. To this writ the sheriff returned, that he had demanded the defendant on the hustings of the *Common Pleas, Guildhall*, on three several days, namely, *Monday next after the feast of St. Dunstan the Archbishop* (19th May); *Monday next before the feast of St. Boniface the Bishop* (5th June); and *Monday next before the feast of St. Edmond the King and Martyr* (20th June), in the same year; but that the defendant did not appear, and because there was no other hustings of *Common Pleas* held at the *Guildhall* aforesaid from the issuing forth of the said writ until the return thereof, therefore the said sheriff could not proceed further thereon; on the 19th of the same month of *June*, 1822, a writ of proclamation, tested and made returnable on the same days as the exigent, issued into *Middlesex*, for proclaiming the defendant to come in. To this writ the sheriff returned that he had caused the defendant to be proclaimed three several days, according to the form of the statute (*a*). On the 22d *October* last, an allocatur exigent was issued into *London* against the defendant, returnable on the *Morrow of All Souls*, to which the sheriff returned that he had demanded the defendant a fourth and fifth time at the hustings of the *Common Pleas* at the *Guildhall*, namely, *Monday next after the feast of the Apostles St. Peter and St. Paul*

The writ of exigent upon an outlawry must be in the hands of the sheriff at the time the defendant is demanded. Where the sheriff returned to a writ of exigent, and to a writ of allocatur exigent, that he had demanded a defendant at the hustings upon five several days, when out of four of the five, the writs could not by possibility have been in his possession: Held, that the returns were irregular.—*Semble* also, that the writ of proclamation upon an outlawry is void, unless the requisites of 31 *Eliz.* c. 3. s. 1. are complied with. An attorney making an affidavit to support a motion to set aside an outlawry against a defendant who has not appeared, must shew that he is authorised to act for the defendant.

(*a*) 31 *Eliz.* c. 3. s. 1.

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(29th June), and on *Monday next after the feast of St. Benedict the Abbott* (8th *July*, 1822), but he did not appear, and therefore he was outlawed. The ground of irregularity alleged to exist in the returns to the exigent and allocatur exigent was, that three at least out of the five demands made thereon, were made when the writs could not by possibility be in the hands of the sheriff, which the practice of the Court required they should be when the demands were made; and to the returns to the writ of proclamations the irregularity alleged was, that the proclamations required by the statute 31 *Eliz.* c. 3. s. 1 (*a*), could not by possibility be made between the day it was issued and the day of the return, inasmuch as there was no County Court or General Quarter Sessions of the Peace held, at which the defendant (who was out of the kingdom at the time) could be proclaimed whilst the writ was running.

*Platt* now shewed cause, and produced an affidavit, stating that the proceedings to outlawry in this case were the same as had been adopted in similar cases in *London* and *Middlesex*, for upwards of forty years. [*Abbott*, C. J.—If

(*a*) By which it is enacted, that "in every action personal, wherein any writ of *exigent* shall be awarded out of any Court, a writ of proclamation shall be awarded and made out of the same Court, having day of teste and return as the said writ of exigent shall have, directed and delivered of record to the sheriff of the county where the defendant, at the time of the exigent so awarded, shall be dwelling; which writ of proclamation shall contain the effect of the same action: And that the sheriff of the county, unto whom any such writ of proclamation shall be delivered, shall make three proclamations, *one* in the open county court, *another* at the General Quarter Sessions of the Peace, in those parts where the defendant, at the time of the exigent awarded, shall be dwelling, and the *third* one month at the least before the *quinto exactus*, by virtue of the said writ of exigent, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling: and if the defendant shall be dwelling *out* of any parish, then in such place as aforesaid of the next adjoining parish in the same county, and upon a *Sunday*, immediately after divine service and sermon (if there be one), and if there be no sermon, then forthwith after divine service: And that all outlawries had and pronounced, whereupon no writs of proclamations shall be awarded and returned according to the form of this statute, shall be utterly void and of none effect."

that be so, it is high time the practice should be corrected.] At all events, he submitted, that supposing this practice to be irregular, the Court was bound by the sheriff's return, which, if it was false, the defendant had his remedy by bringing an action for a false return. There was, however, a more conclusive answer to the present rule, namely, that the attorney who made the affidavit in support of the motion, did not describe himself as the defendant's attorney or agent, nor did he state that the application was made at the defendant's instance and request, which he was bound to do, inasmuch as the defendant did not appear in person. Upon this objection the Court stopped him, and called upon

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*Marryat* and *Chitty*, contrà, who contended, that as there was no appearance to the proceedings, the deponent could not, with propriety, describe himself as the attorney of the defendant; but

PER CURIAM.—This is a fatal objection to this rule. The deponent must shew that he has some authority to act for the defendant; otherwise, a mere stranger might come in, which cannot be allowed. But for this objection, we should certainly have made this rule absolute. The practice of demanding a man in proceedings to outlawry, which are most serious in their consequences, without any writ authorising the sheriff so to do, is clearly irregular. Here, some of the demands stated in the returns to the first exigent, and the allocatur exigent, must have been made when there was no writ in the sheriff's hands. It is the duty of the plaintiff's attorney to take out the process and put it into the hands of the sheriff, in order that he may make the demands, and the sheriff is bound to have the exigents in his hands when the demands are made. With respect to the return to the writ of proclamations, the requisites of the statute of *Elizabeth* do not appear to have been complied with; but at present we are not required to

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give any opinion upon that point, as the rule must be disposed of upon the objection to the affidavit.

Rule discharged, without costs (a).

(a) Vide *Somerville* v. *Watkins*, 14 East, 536. Tidd, 6th ed. 131, et seq.; 5 & 6 *W. & M.* c. 21. s. 4. and 9 & 10 *W.* 3. c. 25. s. 42.

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HENRY WARTER and MARGARETTA MARY ELIZABETH WARTER, Infants, by their next Friend, *v.* JOHN HUTCHINSON, surviving Trustee, and MARGARETTA ELIZABETH MEREDITH WARTER, an Infant, by JANE WARTER, Widow, her Mother and Guardian.—And JANE WARTER, Widow, and MARGARETTA ELIZABETH WARTER, an Infant, by the said JANE WARTER, her Mother and next Friend, *v.* JOHN HUTCHINSON, HENRY WARTER, and MARGARETTA MARY ELIZABETH WARTER, Infants, by their Guardian.

A testator devises his lands charged with two annuities, and subject to certain legacies, to trustees, their *heirs and assigns*, until his nephew *J.*, son of his sister *M.* should attain twenty-one; and if he should die in the mean time, until *H.*, second son of *M.*, should arrive at that age; and if *H.* should die in the mean time, until the daughter of *M.* should arrive at that age, upon trust to raise out of the rents of the premises, or by sale or mortgage thereof, portions for *H.* and the younger children of *M.* payable on their attaining twenty-one; and further, to apply a proper sum out of the rents for the maintenance and education of *J.* until he should attain twenty-one, and then to pay him the residue; and if he should die before twenty-one, then to apply a like sum for the maintenance of *H.* till he should attain that age, and then to pay him the residue; and in the mean time to place out the money arising from the rent at interest, for the benefit of *J.*, and when *J.* should attain twenty-one, or in case of his death, when and as soon as *H.* should arrive at that age, or in case of his death, when the daughter of *M.* should attain twenty-one, to the use of *J.* and his assigns for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and after the death of *J.* to the use of his first and other sons and daughters in strict tail; and for default of such issue, to the use of *H.* with similar limitations over to his niece, the daughter of *M.* and an ultimate remainder to *M.* in fee. Testator died, leaving his sister *M.*, her sons, *J.* and *H.* and three younger children alive. *J.* married and died intestate under twenty-one, leaving a daughter:—Held, first, that the trustees took only a chattel interest in the estates devised to them; second, that on the death of the testator, *J.* took a vested estate for life; third, that the daughter of *J.* took an estate in tail-male on the death of her father; and fourth, that *H.* took, at testator's death, a vested estate for life in remainder, expectant on the death of his brother *J.* and failure of sons and daughters to be born to *J.* and issue male of such sons and daughters.

THE following case was sent by his Honor the Vice Chancellor for the opinion of this Court; after having been twice argued in the Common Pleas (a):—

*Thomas Meredith*, of *Pentrebychan Hall*, in the county of *Denbigh*, M. D. by his will bearing date the 8th *Sep-*

(a) See 5 J. B. Moore, 144.

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*tember*, 1801, duly executed and attested to pass real estates, after directing the payment of his debts and funeral expences, by his trustees and executors thereinafter named, and for which purpose he thereby charged, subjected, and made liable all his capital and other messuages, lands, and hereditaments whatsoever, situate in the several counties of *Denbigh* and *Chester*, to the payment of the same, in aid of his personal estate; and subject thereto, he gave and devised all and every his said capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, to the Rev. *Brownlow Yorke*, *Richard Lloyd*, Esq. and *John Hutchinson*, their heirs and assigns, subject to the following uses and estates (that is to say):— In trust, to permit and suffer his sister, *Margaretta Warter*, the wife of *Joseph Warter*, and his aunt, *Mary Newton*, to have, take, and enjoy, out of the said hereditaments and premises for their respective lives, each, a certain annuity therein mentioned, with the usual power of entry and distress; and subject to those two several annuities, he gave and devised the said capital and other messuages, &c. to the said trustees, their heirs and assigns, until his nephew, *John Warter*, the son of his sister *Margaretta Warter*, should attain the age of twenty-one years; and if he should die in the mean time, until *Henry Warter*, the second son of the said *Margaretta Warter*, should arrive at that age; and if the said *Henry Warter* should die in the mean time, until the daughter of the said *Margaretta* should arrive at that age, upon the following uses and trusts (that is to say):— that they the said trustees, and the survivor of them, his heirs and assigns, should in the first place, as soon as conveniently might be after his decease, levy and raise out of the rents and profits of the premises, or by sale or mortgage thereof, any sum or sums of money as would be sufficient to pay and satisfy all his just debts and funeral expences, and all costs, charges, and expences which they the said trustees might sustain, on account of the trusts thereby in them reposed; and further, that they should levy and raise out of the rents and profits of the said premises, or by sale

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or mortgage thereof, or of a competent part thereof, the full sum of 2000*l.* together with all costs and charges attending the raising the same, and pay the same to the said *Henry Warter*, the younger, son of his sister the said *Margaretta Warter*, as soon as he attained the age of twenty-one years; and if his said sister should happen to have more than one younger child, then and in such case, he directed his said trustees to raise, out of the rents, issues, and profits of the said premises, the full sum of 3000*l.* and pay the same to and amongst such younger children, share and share alike, as soon as they should severally attain their respective ages of twenty-one years; and he charged the said hereditaments with the payment of the same; and upon further trust, that they the said trustees, their heirs and assigns, should pay and apply a proper sum of money arising from the rents and profits of the said premises, for the maintenance and education of his nephew *John Warter*, till he should arrive at the age of twenty-one years; and when he should attain that age, then upon further trust, to pay him the rest and residue of the said rents, issues, and profits of the said premises, if any should remain in their hands, after payment and satisfaction of all his just debts and funeral expences, and the said sum of 2000*l.* or 3000*l.* as the case might happen as aforesaid; and if the said *John Warter* should happen to die before he attained the age of twenty-one years, then the trustees were to pay and apply a sufficient sum of the money arising from the rents and profits of the said premises, for the maintenance and education of his nephew the said *Henry Warter*, till he should attain the age of twenty-one years; and when *Henry Warter* should arrive at that age, then upon trust, to pay him the rest and residue of the rents, issues, and profits of the said premises, if any should remain in their hands, after payment and satisfaction of his just debts, and the money intended for his sister's younger children as aforesaid; and in the mean time, to place out the money arising from the rents and profits of the said premises, at interest, for their benefit and advantage; and when and as soon as the said *John Warter*

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should attain the age of twenty-one years, or in case of his death, when and as soon as the said *Henry Warter* should arrive at that age, or in case of his death, when and as soon as the daughter of the said *Margaretta Warter* should arrive at the age of twenty-one years, he gave and devised the said premises, with their appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew the said *John Warter* and his assigns, for and during the term of his natural life, without impeachment of waste; and from and immediately after the determination of that estate, to the use and behoof of the said trustees, to preserve contingent remainders; and from and immediately after the decease of the said *John Warter*, to the use of the first, second, third, and all and every other son and sons of the body of the said *John Warter* lawfully issuing, severally, successively, and in remainder, as they and every of them should be in priority of birth and seniority of age, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder of such son and sons, and the heirs male of his body issuing, being always to be preferred, and take before the younger of them, and the heirs male of his and their body and bodies issuing; and in default of such issue, to the use of the first, second, third, and all and every other daughter and daughters of the body of the said *John Warter* lawfully issuing, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies issuing, always to be preferred, and to take before the younger of them, and the heirs male of her and their body and bodies issuing; and for default of such issue, to the use of his nephew *Henry Warter*, the second son of the said *Margaretta Warter*, and his assigns for life, without impeachment of waste; and immediately after the determination of that estate, to the use of the said trustees, their heirs and assigns, to preserve the contingent

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uses and estates from being barred or destroyed; and from and after the decease of the said *Henry Warter*, to the use of his first, second, third, and other sons, and first, second, third, and other daughters, in like manner as to the sons and daughters of the said *John Warter*; and for default of such issue, to the use of his niece, the last born child of his sister *Margaretta Warter*, and her assigns for life, without impeachment of waste; and after her decease, to the use of her sons and daughters in like manner as to the sons and daughters of the said *John* and *Henry Warter*; and in default of such issue, to the use of his sister, *Margaretta Warter*, in fee.—Provided always, and the testator did thereby declare it to be his will, that the said *John Warter*, or whatsoever other person or persons should, by virtue thereof, become possessed of, or entitled to his said estates, should, from the time he, she, or they should become so possessed, take upon himself, herself, or themselves, the surname of *Meredith*, and should make the mansion-house of *Pentrebychan Hall* aforesaid, their usual and common place of residence; and in case the said *John Warter* should refuse or neglect to reside at, and make use of *Pentrebychan Hall* as his usual place of residence, and take upon himself the surname of *Meredith*, then the will was to be void to all intents with respect to him, and every other person and persons claiming under him, who should so refuse to comply with such direction; and in like manner he directed, that the same should be utterly void in respect to the said *Henry Warter*, and the daughter of *Margaretta Warter*, and every other person and persons claiming under them by virtue of his will, in case he or they should refuse to take the surname of *Meredith*, and reside at *Pentrebychan Hall* as aforesaid. And as to all his household goods and furniture, and all his silver plate whatsoever, that should happen to be at his mansion-house at *Pentrebychan Hall* at the time of his death, he ordered that the same, or any part thereof, should not be sold, disposed of, or removed from thence; but that the same, and every part thereof, should

be deemed and considered to be, go, and continue heir-looms, for the use and benefit of the heirs of *Pentrebychan Hall* for ever; of which will the testator appointed *Richard Edwards*, and his aunt, *Mary Newton*, executors. 1823. WARTER v. HUTCHINSON.

The testator having died on the 7th *April*, 1802, his will was proved in the Consistory Court of *St. Asaph* by both his executors. *Joseph Warter* and *Margaretta* his wife, *John Richard Meredith Warter* (in the will called *John Warter*) their eldest son, and *Henry Warter* their second son, (also named in the said will) survived the testator; and the said *Joseph Warter* and *Margaretta* his wife, also had living at the death of the testator, three other younger children, *viz. Joseph, Thomas,* and *Margaretta Mary Elizabeth,* being the daughter mentioned in the will.

*John Richard Meredith Warter*, on the 5th *August*, 1816, duly intermarried with *Jane Jones*, and on the 6th *April*, 1817 died intestate, without having attained his age of twenty-one years, leaving the said *Jane Warter*, his widow, and *Margaretta Elizabeth Meredith Warter*, his only child by her, and heir-at-law, him surviving. *Henry Warter* named in the will, attained the age of twenty-one on the 16th *November*, 1821. The trustees named in the will had survived the testator, but since his death, two of them had departed this life, leaving *John Hutchinson* surviving trustee.

The questions for the opinion of the Court were, First, whether *Brownlow Yorke, Richard Lloyd,* and *John Hutchinson* in the pleadings named took any, and what estate in the estates devised to them by the will of the testator, *Thomas Meredith.* Secondly, whether, upon the said testator's death, *John Richard Meredith Warter* in the pleadings named, took any, and what estate in the said devised estates and premises. Thirdly, whether *Margaretta Elizabeth Meredith Warter*, the infant, took any and what estate in the said devised estates and premises; and if any, at what period. Fourthly, whether, upon the said testator's death, or upon the death of the said *John Richard Meredith*

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*Warter* under the age of twenty-one, the said *Henry Warter* took any and what estate in the said devised estates and premises. In case the Court should be of opinion that the said trustees took the fee in the said devised estates, in which case the second, third, and fourth questions, as above stated, would not call for any answer, then (assuming for the sake of this question) that a chattel interest only passed to the said trustees, what estates or interests severally did the several persons take who are named in the second, third, and fourth questions?

This case was argued at the Sittings, after last *Hilary* Term.

*Preston*, for *Heury Warter*, contended, first, that the trustees named in the pleadings, took a determinable fee, and not a chattel interest; second, that *John Richard Meredith Warter* never took a vested estate, having died an infant; third, that for the same reason, his infant daughter *Margaretta Elizabeth Meredith Warter*, never took a vested estate; and fourth, that *Henry Warter*, in consequence of the death of his brother under age, took an estate for life, with remainders over, as in the will. In order to determine the questions submitted to the Court the will must be divided into its several parts. The testator having in the first instance devised his estates to his trustees, *their heirs and assigns* generally, the first question is, whether that be a gift of a chattel interest, or a determinable fee; and then supposing it to be a determinable fee, when was the fee to determine? After charging his estates with his debts and funeral expences, he gave them to his trustees, their *heirs and assigns*, in trust, first, to raise and pay two annuities; second, to raise portions for *Henry Warter*, and the younger children of his sister; third, to maintain and educate *John Warter*, *until* he attained twenty-one; fourth, when he attained twenty-one, then the residue of the profits, if any should remain in their hands, after payment of the

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debts and raising the portions are given to him; fifth, in case *John* should die before twenty-one, then to apply a portion of the rents and profits for the maintenance and education of *Henry*, *until* he should attain twenty-one, and when he arrived at that age, then upon a like trust as for *John's* taking; and then in trust until his niece attained twenty-one. First, he gives a fee, and then he limits it *until* three several infants should respectively attain majority. The difficulty, therefore, arises from the testator's confusion of language. After having given the fee to the trustees, he unnecessarily gives them the estate *until* the infants attain twenty-one. These are not uses in the strict sense of the word, but trusts to be performed. The trustees therefore must be held to take, a determinable fee. Determinable, when? Why, determinable by *John's* attaining twenty-one, or dying under that age, and so toties quoties, with respect to the other infants. The legal effect of this part of the will would be, that if all these three persons died under twenty-one, there would not be any ulterior gift under the will. It must be contended on the other side, either that the trustees took the entire fee for the purpose of the will, and that the trusts were to be executed in a Court of Equity, or that they took only a chattel interest determinable on the events expressed in the will. The Court, however, is not at liberty to say that they took the whole fee. The testator has expressed his intention in such words as plainly shew that they were not to take the fee-simple at all events. The intention was simply to provide trustees for these infants during their minority. His debts and legacies are charged upon his estate by separate clauses, and power is given to the trustees to raise the money by sale or mortgage. Then he provides in what manner the estate shall be disposed of when *John Warter* attains twenty-one. The moment, therefore, he attained that age, the estate to the trustees would have ceased, and the limitations of the will would have come into full operation. The gift is to the trustees and their heirs until a certain event takes place. There is nothing incompa-

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tible with its being a determinable fee. A chattel interest is a provision of necessity in favor of wills, but never to be adopted without absolute necessity. If the Court can give effect to the will consistently with the rules of the common law, they will do so without resorting to a chattel interest. *Mansfield* v. *Dugard* (*a*). There is one most cogent reason why the trustees should take a determinable fee, rather than a chattel interest. If they took a chattel interest there was no occasion to use the word "*heirs*" for if a chattel interest was meant to be given, the executors would be the trustees. The case of *Goodtitle* v. *Whitby* (*b*), is reconcileable, by saying that it was a chattel interest until the infant attained twenty-one, but that the infant had a vested estate in the mean time. At all events it was determinable by the death of the infant, or his attaining twenty-one. It would be confounding the measure of estates, to say that trustees can have an estate to them and *their heirs*, until *A*. attains twenty-one, unless it be either a fee or a life estate. Mr. *Fearne*, in observing on *Lethieullier* v. *Tracy* (*c*), in his "Essay on Contingent Remainders" (*d*), is mistaken in supposing that Lord *Hardwicke* thought that a fee could be given in the first instance, and a vested remainder behind it. Referring to the report of that case, it will be found (*e*), that all the remainders were said to be vested on the determination of the fee given to the trustees. The result of the case, as stated by Mr. *Fearne*, would be a solecism. That case decides this proposition, that the gifts to the trustees was a determinable fee. The case therefore of *Lethieullier* v. *Tracy* is an authority, for shewing that this is not a chattel interest, but a determinable fee, and the case of *Wright* v. *Pearson* (*f*), explains the principle on which that doctrine is founded. At what time then were the trustees to become seised of a legal estate for the purpose of executing the trusts? First, when *John Warter*

(*a*) 1 Eq. Cas. Abr. 195, pl. 4.
(*b*) 1 Burr. 228.
(*c*) 3 Atk. 774.
(*d*) 7th Edit. page 226.
(*e*) Page 779.
(*f*) 1 Eden, 119.

should attain the age of twenty-one.' He had not attained twenty-one, and therefore that event has failed. Then second, when *Henry Warter* attained twenty-one, and that event has happened, and having happened, it is immaterial for the purposes of this will whether *Margaretta Warter*, his sister, may have attained majority. *Boraston's* (a) case establishes clearly when a remainder becomes vested after a chattel interest during minority. But this case is totally distinct from that case, and for this reason:—By the plan of this will it is clear that the estate was not to determine with *John Warter's* attaining twenty-one, but to be held in trust for *Henry Warter*, and *Margaretta Warter* respectively; and that case makes this case one of the most difficult ever submitted to judicial decision. *John Warter* could never have an estate before the trustees had the seisin to serve the uses, and there must have been a vesting and seisin in them before the uses could arise. If *John Warter* had died under twenty-one, leaving no issue, *Henry Warter* would not have been in the seisin under the gift of the will, for the estate of the trustees would have continued for other purposes. It is obvious that the testator had no motive beyond that of providing for an object who should attain the age of twenty-one, and intended that the estate should go over if that event did not happen. The Court are bound by what he has done, and cannot conjecture what he possibly might have done had he contemplated the event which has happened. *John Warter*, therefore, having died under twenty-one, the event on which he was to take failed, and he never had a vested estate, and it could not go to his issue. The testator has never contemplated the event of *John Warter* dying under twenty-one, leaving issue. If he had, there is no doubt that some provision would have been made for that event. None having been made, the Court cannot impute an intention to the testator which has not been expressed. The question then is, whether *Margaretta Meredith Warter*, the infant, took any estate in the premises.

(a) 3 Rep. 21.

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She clearly took no estate, because her father died under twenty-one. This is obvious from the context of the will, and is the necessary effect of all the dispositions, *Strong* v. *Teatt* (a). The next question is, whether on the death of *John Warter*, under twenty-one, his brother *Henry* took any, and what estate. It is clear from the frame of the will, that if *John* died under twenty-one, *Henry* was to be entitled to the accumulations arising during his own infancy. There was a clear intention that he should be substituted in the place of *John* and his children, if *John* died under twenty-one. There must have been a suspension of ownership, from the time of *John*'s dying under twenty-one, till *Henry* attained that age, unless *Henry* was immediately seised. The daughter of *John* clearly could not have taken any thing, and if she was excluded for a portion of time, why might not she be excluded for ever? [*Bayley*, J. May it not mean this, if *John* dies under twenty-one, *Henry* shall have the accumulations, but that *John*'s child shall have the estate?] This case must be governed by principle, and no provision is made for the maintenance and education of *John*'s child; no doubt it would have been made, had the testator at all contemplated, that on his elder nephew dying under age, his issue should be entitled. If this had been a gift to *John* and his, heirs, and if he should die without leaving issue, to *Henry* and his heirs, the issue of *John* would have been excluded, and why not his children designated by description? First, then it is clear, that the trustees took a determinable fee, and not a chattel interest; second, that *John Warter* never took a vested estate, having died an infant; third, that for the same reason his infant daughter never took a vested estate; and, fourth, that *Henry Warter*, in consequence of the death of his brother under age, has taken an estate for life, with remainders over as in the will directed. Then, fifthly, the question (assuming that a chattel interest only passed to the trustees) is, what estate did *John*, his infant daughter, and *Henry*, severally take under

(a) 2 Burr. 910.

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the will. [*The Court* asked whether there was ever an instance of such an hypothetical question put to the Court for its decision, and they were referred to *Wykham* v. *Wykham* (*a*), and *Sanford* v. *Irby* (*b*).] It is clear that *John* and his daughter never took any estate, and that *Henry* took a vested estate at the age of twenty-one. Any other construction would be inconsistent with the language of the will, and the obvious intention of the testator. The chattel interest was to continue distinct for paying debts, and raising portions. There was clearly no intention that any fee should arise until *John* attained the age of twenty-one. How then can it be said that an estate depending on certain events, must arise at all events? It is clear that *John's* was not an estate *at all events,* because *Henry's* interest is interposed. A remainder after a gift during minority, to be determined by death, is a vested estate, but if there be any other event expressed, such a consequence becomes impossible. In *Jordan* v. *Holkman* (*c*), a testator devised lands to his wife during her widowhood, and if she should marry again, then his daughter to enter, provided that if his wife married, and survived his daughter, the estate should return to her. That would be a vested remainder by construction in the daughter, but if it had been a devise during widowhood, with remainder on marriage again *within a limited time,* the same consequence would not follow, because it would be contingent, and the interest would not be vested. So also if a man makes a lease for life, and that a day after the death of the tenant for life, it shall remain over, this remainder is void, because the first estate must determine before the remainder can commence, *Plowd.* 25. Here, if *John* had died under twenty-one, and *Henry* was not to have it until twenty-one, his interest must be contingent. Therefore, upon his attaining that age, the estate becomes vested in him, and he is entitled to a certificate in his favor.

(*a*) 11 East, 458. (*b*) 3 B. & A. 654. (*c*) Ambl. 209.

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*Hodgson*, for the personal representatives of *John Warter*, and of his infant daughter (who died since the case was directed), contended, in answer to the first question, that the trustees took a legal estate in fee; but laying that aside for the sake of argument, he contended, in answer to the second, that *John Warter*, upon the death of the testator, took a vested estate for life; to the third, that *Margaretta*, the infant, took an estate in tail male, on the death of her father; and to the fourth, that *Henry Warter* took, at the testator's death, a vested estate for life in remainder, expectant on the death of his brother *John*, without issue. As to the first point, the trustees took a legal estate in fee-simple, or at least a power to sell or mortgage the fee, to the extent of the trusts. But if neither of these propositions can be maintained, they took a particular estate, that is, an estate capable of supporting remainders, and not a fee determinable upon particular events. Did then the trustees take the fee-simple at law? In the first place, the testator not only charges his estates with his debts, but directs them to be raised immediately by *sale* or *mortgage*; this shews that the trustees have the legal estate for this purpose, because this trust can only be executed by persons having a legal estate or legal power. There are acts to be done. They are to pay the debts, funeral expences, and legacies, by sale and mortgage of the estate. There are also annuities to be raised by a rent-charge. It is true, indeed, that the annuitants have the power of entry and distress, but this comes after the gift to them, and therefore it is more reasonable to hold, that this was one of the purposes of the trust, and that these legal powers were to be exercised in the names of the trustees. If the estate of the trustees were to determine upon *John Warter* attaining the age of twenty-one, how could these trusts be executed, at least in the mode pointed out by the will, because no purchaser or mortgagee could be found to advance his money for the purposes for which it was required. The trustees therefore could not execute their trusts by sale or mortgage, unless

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they had the fee. But beside these, there are other acts to be done upon *John Warter*'s attaining majority, which could not be performed unless the trustees had the legal estate. Courts of law are undoubtedly jealous of giving too large estates to trustees, *Doe* v. *Simpson* (*a*); but there are cases where, although the estate is limited in terms, the Court will enlarge it to give effect to the object of the trust. This was admitted in *Doe* v. *Simpson*, although it was held that the words did not give the fee. In this case it is quite clear that the trustees must have taken the fee-simple, or the trusts of the will could not have been executed. But if this is made out the other questions cannot be entertained in a court of law. The negative must therefore be admitted for the sake of argument. Then the trustees took a particular estate (a chattel interest) for the purpose of executing the trusts of the will, and *John Warter* and *Margaretta*, his infant daughter, took vested remainders. For this *Boraston's* case (*b*), *Manfield* v. *Dugard* (*c*), *Goodtitle* v. *Whitby* (*d*), *Doe* v. *Lea* (*e*), *Doe* v. *Underdown* (*f*), and *Stanley* v. *Stanley* (*g*), are authorities. In all these cases an estate is given to fill up the interval until the devisee attains twenty-one. The cases of *Bromfield* v. *Crowder* (*h*), and *Brownsword* v. *Edwards* (*i*), are also to the same effect. The most important part of the will is this:—"And when and as soon as the said *John Warter* shall attain the age of twenty-one years, or in case of his death, when and as soon as the said *Henry Warter* shall arrive at that age, or in case of his death, when and as soon as the daughter of the said *Margaretta Warter* shall arrive at the age of twenty-one years, I give and devise the said premises, with their appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of *John* for life, with remainders over, &c." Now if this part of the will be taken

(*a*) 5 East, 162.
(*b*) 3 Rep. 21.
(*c*) 1 Eq. Cas. Abr. 195, pl. 4.
(*d*) 1 Burr. 233.
(*e*) 3 T. R. 41.
(*f*) Willes, 293.
(*g*) 16 Ves. 491.
(*h*) 1 New Rep. 313.
(*i*) 2 Ves. 243.

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literally, it is clearly in favor of the present argument. The introduction of the condition of *Henry's* attaining twenty-one, was utterly unimportant, unless *John Warter* had died under that age, because the preceding gift is to the trustees during the minority of *John*; and if *John* should die before majority, then during the minority of *Henry*; and if he should die before majority, then during the minority of *Margaretta*, the niece; yet by the express words *John* was to take, if either of the three contingencies happened. [*Bayley*, J. May not the rule, reddendo singula singulis apply?] That would make the remainders to *John's* children dependant on his attaining twenty-one, while the authorities above cited go to shew that even his own estate was not contingent. The testator did not intend that his nephew *Henry* should take more than a younger child's portion, unless in the case of a total failure of issue of the body of his brother *John*; and there are no words in the will which import that his living to the age of twenty-one must be taken to be a condition precedent to his being entitled to the estate, but that provision was merely introduced to shew the time when he should come into the management of it. A fortiori it is not a condition precedent to the estates of his children. It is not a devise to him *in case* of his attaining that age, but it is vested in the trustees *until* he should become twenty-one, when he would be capable of taking possession. Mr. *Fearne*, in commenting upon the case of *Lethieullier* v. *Tracy*, is certainly erroneous in his view of it; but that case proves Lord *Hardwicke's* opinion to be, that the contingency of dying under twenty-one, does not affect the subsequent estates. Though here the contingency of *John's* attaining twenty-one has failed, yet that would not prevent his child taking a vested remainder. The interval, if any, is filled up by a limitation to the trustees during the minority of *Henry*. It will follow, then, that the trustees took a particular estate, and what particular estate they took it is unimportant to inquire. It is necessary for me (as the fifth question is worded) to argue, that

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they took merely a chattel interest; it is sufficient that they took a particular estate, followed by a remainder to *John Warter*, and remainders to his issue in tail, under which the infant *Margaretta* took a vested estate tail. The argument on the other side rests much on the trust for maintenance, and as to the accumulations of rents. It assumes, that this trust is for the *next in remainder*; and then infers that the *person named in this trust* must be the next in remainder. The assumption may be admitted, but the inference is not correct. If the testator has given an estate to endure during the successive minorities of his nephews, for a particular purpose, with remainders over in strict settlement, the first presumption is, that as to any surplus rents during the particular estate, the testator intended a resulting trust for the remainder-man. The Court is at liberty to imply, that this is a resulting trust, because the will shews that such was the intention, though the description of the persons to take under it is imperfect or inaccurate. But this obvious intention may also be effected by implying the words "without issue" after those applying to *John*'s death under twenty-one. In *Jenkins* v. *Harris* (a), since carried into the House of Lords, it was held, that the words "without issue" might be implied. The cases of *Spalding* v. *Spalding* (b), and *King* v. *Melling* (c), are also authorities upon this point, and they are stronger than this case, because there the implication was admitted in the *devising* clause, whereas here it is only necessary in a clause collateral and secondary to the words of devise. Here is a clear set of limitations, shewing that this testator meant that these nephews and their respective families, should enjoy the property in strict limitation, and there is nothing to oppose this construction, but the inaccurate expressions used in the declaration of a trust, whereby the testator clearly meant no more than a resulting trust, to follow these limitations. It is impossible for the Court to give effect to the will, unless *John Warter* took a vested estate for life, with re-

(a) 4 Madd. 67. (b) Cro. Car. 185. (c) 1 Vent. 231.

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mainder to his issue, for otherwise the whole object of the will must be defeated. On these grounds it is submitted, first, that if the trustees did not take the fee simple, they took a particular estate, which was to determine either when *John* or *Henry*, or *Margaretta*, should respectively attain the age of twenty-one; and, second, that *John* took a vested remainder for life, with remainder in tail to his infant daughter, which took effect in possession, upon the death of her father, or at all events upon her uncle *Henry*'s attaining twenty-one.

*Preston*, in reply, contended, that the case of *Jenkins* v. *Harris* could not be considered as an authority, because it had been sent back by the House of Lords to the Court of Chancery. The case of *Stanley* v. *Stanley* was distinguishable from this, because here, after the failure of *John*'s estate, there was an ulterior trust for *Henry* during minority. The Court could not enlarge the estate to the trustees by implication, unless there was an express intention or declaration that they should take the fee simple, or unless there was some absolute necessity for the purpose. Here no such necessity existed. He cited *Doe* v. *Fyldes* (*a*), and *Doe* v. *Shippard* (*b*). As to *Boraston*'s case, it was no authority for the purpose for which it was cited, because here the estate did not vest in *John* upon his father's death, but was held in trust by the trustees for ulterior purposes, upon a condition which had failed. The attaining majority was a condition precedent, and having failed, the estate devolved on *Henry*, the next in remainder.

*Cur. adv. vult.*

The following certificate was sent to the Vice Chancellor:—

This case has been argued before us, and we are of opinion, that *Brownlow Yorke*, *Richard Lloyd*, and *John Hutchinson* took only a chattel interest in the estates devised to them.

(*a*) Cowp. 833. (*b*) 1 Dougl. 75.

We think, that on the death of the testator, *John Richard Meredith Warter* took a vested estate for life.

We think, that *Margaretta Elizabeth Meredith Warter*, the infant, took an estate in tail male on the death of her father.

We think, that *Henry Warter* took, at the testator's death, a vested estate for life in remainder expectant on the death of his brother *John Richard Meredith Warter*, and failure of sons and daughters, to be born to *John Richard Meredith Warter*, and issue male of such sons and daughters.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

## The KING *v.* HUMPHREY WYLLYAMS.

Where the charter of a corporation, consisting of a mayor and twenty-four capital burgesses, granted, that when and so often as it should happen that any one or more of the twenty-four capital burgesses should die, or dwell without the borough, or should, from any cause, be removed, that then and so often it should and might be lawful to the other capital burgesses "*at that time surviving or remaining*, or *the greater part of* THE SAME," of whom the mayor for the time being should be one, to elect another, &c.; and a burgess having been elected to fill up a vacancy [occasioned by death] by *twelve capital burgesses only* who were alleged to be the capital burgesses *at that time surviving and remaining*:—Held, that the election was void, not being made by a majority of the *whole* definite body, to which the words "or the greater part of *the same*," were referable.

THIS was an information in the nature of a quo warranto, against the defendant, for exercising the office of one of the capital burgesses of the borough of *Truro*, in *Cornwall*, without any legal warrant, &c. The defendant pleaded, that the borough of *Truro* was an ancient borough, and that Queen *Elizabeth*, by letters patent dated 20th *June*, in the 31st year of her reign, did grant that the said borough should be a free borough, and that the inhabitants and their successors, should from thenceforth be a body corporate

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and politic, by the name of "The mayor and burgesses of the borough of *Truro*," &c. that from thenceforth for ever there should be twenty-four of the most discreet and honest inhabitants; who should be helping and assisting to the mayor for the time being, in all matters concerning the borough; that four of the twenty-four capital burgesses should be called aldermen, and should be chosen every year by the major part of the same twenty-four capital burgesses; that the mayor, aldermen, and capital burgesses, or the greater part of them, for the time being, should have power to elect a recorder, a steward of the court of the borough, and other officers; that the Queen ordained one *Thomas Burges* to be the first mayor, and twenty-four inhabitants, by name, to be the first capital burgesses, and four of those capital burgesses to be the first aldermen, which aldermen should be perpetually assisting and helping the mayor in all things concerning the borough, and that two of them at the least ought to be present in all assemblies to give their help, assistance, and voices at the election of the mayor and other officers; that the Queen granted unto the mayor and capital burgesses and common council for the time being, or the greater part of them, power and authority every year, on the 9th *October*, to nominate and assign an alderman to be the mayor for one whole year then next following; and that when and so often as it should happen that one or more of the twenty-four capital burgesses for the time being should die, or dwell without the borough, or should be for any cause removed from his office, it should be lawful to the other capital burgesses "*at that time surviving or remaining, or the greater part of the same,*" of whom the mayor for the time being should be one, to elect another or others into their place or places, &c. The plea then stated the acceptance of the charter, and that on the 15th *February*, 1805, *Peter Tippet*, Esq. then being one of the capital burgesses, died, and after his death, and before any other burgess had been elected in his place (to wit), on the 10th *May*, 1820, *J. T. Benallack*, then being mayor of the

borough, *together with the major part of the capital burgesses surviving and remaining* at the time of the meeting and assembling together for the election hereinafter next mentioned, did duly meet and assemble together for the election of a capital burgess in the room of the said *P. T.*, and being so met and assembled together, did then and there nominate, elect, and prefer defendant, being a burgess, to be a capital burgess of the borough in the room of the said *P. T.*, and that after he was elected, and before he took upon himself to exercise the office, he did in due manner take his corporal oath, &c. before the mayor, for the faithful execution of the office, and by virtue of the premises he was and still is a capital burgess of the said borough, &c. Replications, first (with a protestando), that Queen *Elizabeth* did not grant in manner and form as in the plea alleged; second, that the charter was not accepted; third, that *P. T.* was not one of the capital burgesses; fourth, that *J. F. B.* the mayor, together with the major part of the capital burgesses of the borough, surviving and remaining at the time of the meeting and assembling together for the election in the plea mentioned, did not duly meet and assemble together for the election of a capital burgess, as in the plea alleged; fifth, that *J. F. B.*, together with the major part of the capital burgesses surviving and remaining, &c. did not elect defendant, as in the plea mentioned; sixth, that at the time of the supposed election of defendant, there was not present a majority of the capital burgesses who survived and remained at the time of the death of *P. T.*; seventh, that at the time of the supposed election of defendant, there was not present a majority of the capital burgesses who survived and remained at the time of the death of *P. T.*, and who were surviving and remaining at the time of the supposed election; eighth, that at the supposed meeting of the capital burgesses in the plea mentioned, there were only present the mayor and eleven of the capital burgesses, and that the supposed election was made by the said mayor and the said eleven capital burgesses, and no more; ninth,

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that defendant was not a burgess at the time of the supposed election; tenth, that defendant was not sworn in due manner to execute the office of a capital burgess; eleventh, that defendant was not, nor is, a capital burgess in the manner pleaded; and twelfth (after setting out the letters patent with a prout patet), that at the supposed assembly for the election of a capital burgess, there were not two of the aldermen of the borough present, or giving their aid or assistance or voices in the said election, according to the exigency of the said letters patent. Rejoinder to the first, second, third, fourth, fifth, ninth, tenth, and eleventh replications, and issue thereon. Demurrer to the sixth, seventh, eighth, and twelfth replications, and joinder in demurrer.

This case was argued in a former Term by *G. Cross*, for the Crown, and *Tindal* for the defendant, when the latter obtained leave to amend the plea, as it is now above set forth. The principal question then, and now intended to be raised in argument, was, whether it was necessary to the validity of the defendant's election, that there should be a majority of the whole number of twenty-four capital burgesses present at the election, or whether it was sufficient that the body should consist of the capital burgesses surviving or remaining at the time of the supposed election. On that occasion it was contended, that by the charter, a meeting of the capital burgesses, surviving or remaining at the time of the election, constituted a good elective assembly, and the defendant having been elected by such an assembly, his election was valid. The case was now again called on for argument.

*G. Cross* for the Crown. The principle which regulates the construction of charters of this description is, that where a corporation, or an integral part of a corporation, consists of a definite body, no corporate act can be done unless the majority of that body be present; *Rex* v. *Mor-*

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*ris* (*a*), *Rex* v. *Bellringer* (*b*), *Rex* v. *Varlo* (*c*), *Regina* v. *Locke* (*d*), *Rex* v. *Grimes* (*e*), *Rex* v. *Monday* (*f*), and *Rex* v. *Bower* (*g*). In this case the elective body consists at least of twenty-four capital burgesses, and the question is, whether a majority of that original body should be present, or whether the number surviving and remaining at the time of the death of a capital burgess, or the time of the election of the substitute, is enough to be present at the time of the election of a capital burgess. In *Rex* v. *Miller* (*h*), Lord *Kenyon* says, that not only a majority of the definite body must exist, but must attend at the time the corporate act is done; and there the principle is said not to be new. *Regina* v. *Locke* (*i*), proves that it is not new. In construing this charter, the Court will decide upon general principles; and they will look to the probable intention of the Crown in creating the corporation, without regard to minute expressions which may happen to be found in detached passages. The part of the charter upon which the question arises is this: "that when and so often as it shall happen that any one or more of the aforesaid twenty-four capital burgesses, or counsellors of the same borough shall die, or dwell without the aforesaid borough, or shall be for any cause removed from his office of capital burgess aforesaid, that then and so often, it shall and may be lawful to the other capital burgesses, *at that time surviving or remaining, or the greater part* OF THE SAME, of whom the mayor for the time being shall be one, to elect, nominate, and prefer another," &c. Now, it is obvious that the words "*the greater part of the same*" refer to the original number of twenty-four, inasmuch as they follow the words "surviving or remaining," which words mean only "for the time being." In another part of the charter which applies to the mode of electing a capital burgess in the room of a person removed,

(*a*) 4 East, 17.
(*b*) 4 T. R. 820.
(*c*) Cowp. 248.
(*d*) 6 Vin. Abr. 269.
(*e*) 5 Burr. 2598.
(*f*) Cowp. 537.
(*g*) Ante, vol. ii. 761. 842.
(*h*) 6 T. R. 268.
(*i*) 6 Vin. Abr. 269.

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the words are "the mayor and capital burgesses, or the greater part of them for the time being." It is true that the words "for the time being" are not in the part of the particular clause under consideration; but it is obvious that both clauses must receive the same construction; for otherwise this absurdity will follow, that there would be a different mode of electing a capital burgess in each case respectively. Taking the whole of the clause in question together, it is quite clear that the words "the greater part of the same" must refer to the greater part of the original number. Here, the words "surviving and remaining" precede "the greater part of the same"; but that is wholly immaterial. The words must either mean, surviving or remaining at that time, *without restriction*, or else they must refer to the majority of twenty-four capital burgesses. In looking to the different parts of the charter as set out upon the record, it will be found that there are sixteen instances in which the words "for the time being" are used, and in every single instance, it will appear that they refer merely to the then existing state of the corporation. It is remarkable also, that the words "at that time surviving and remaining" occur but twice in the whole charter; once in the clause respecting the election of capital burgesses, and the second time in the clause respecting the election of a recorder. If, therefore, the Court should give judgment for the defendant, they must put a construction upon the charter inconsistent and incompatible with the rest of its provisions. In *Rex* v. *Bellringer*, the words were, "mayor and common council for the time being, or the major part of *them*," whereas, in the amotion clause, "time being" followed "major part of them," and yet it was held, that a majority of the whole common council was necessary to render the election valid. *Rex* v. *Miller* and *Rex* v. *Morris* are also authorities in support of this construction. The Crown may undoubtedly grant that a lesser number than a majority of the definite body may elect; but then the words of the charter must be

so clear as to exclude all doubt. *Rex* v. *Hoyte* (a). But the recent case of *Rex* v. *Bower* is decisive of the present question. There the words were, "the mayor and aldermen for the time being, or *the greater part of* THEM," and the Court held, that that did not mean the greater part of the aldermen who happened then to be existing, but the greater part of the whole definite body. The onus of taking this case out of the general rule of construction lies upon the other side, and unless a sound distinction is established, the Crown is entitled to judgment.

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*Tindal* was to have argued on the other side, but not being present, the Court proceeded to give judgment.

ABBOTT, C. J.—In this case it does not appear that all the existing capital burgesses were present at the election, but only a part. The general rule has been long established, that where a corporation consists of a definite and indefinite body, a good elective assembly cannot be legally constituted unless a majority of the definite body be present. In *Rex* v. *Bower*, an attempt was made to distinguish that case from the general rule, by reason of some particular words in the charter. The Court on that occasion observed upon the wisdom of the general rule, and we were of opinion that the particular words in that charter were not sufficient to take the case out of it. We were of opinion that the charter did not manifest any clear intention on the part of the Crown, that the elective meeting should be composed of less than a majority of the entire number of the definite body, and that a less number would be sufficient to constitute a valid election. Adverting to the language of the charter in this case, I entertain the same opinion. I cannot see any clear or unambiguous intention expressed on the part of the Crown, that less than a majority of the twenty-four capital burgesses should be sufficient to constitute a valid election. I am of opinion, therefore, that on these

(a) 6 T. R. 430.

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pleadings, judgment must be given for the Crown. Another question might arise upon the charter, which does not arise on this record, namely, supposing the definite body to be reduced to less than one half its entire number, or only twelve had survived, whether that would be a good elective assembly. That point, however, is not raised upon the present pleadings, and therefore it is not necessary to pronounce any opinion upon it.

Bayley, J.—I think there is no substantial difference between this case and *Rex* v. *Bower*, decided in the course of the present Term. The general rule is that which has been already stated by my Lord Chief Justice, and is established by *Rex* v. *Bellringer*, and a variety of other cases. The case of *Rex* v. *Hoyte* establishes that a charter may be so worded as not to make it necessary that the major part of the definite body should meet; but then there should be plain and distinct words to shew, that such was the intention of the Crown at the time the charter was granted. In *Rex* v. *Bower* the words were, "the capital burgesses *for the time being*, or *the greater part of them*." It might be said, that meant the major part of the capital burgesses for the time being, and that less than the majority of the definite body might be sufficient; but the Court held, that such was not the construction to be put upon the words "*greater part of them*," but that they must be referred to the greater part of the entire number of capital burgesses. Here the words are, "the other capital burgesses at that time surviving or remaining, or *the greater part of the* same," which are exactly synonymous with "the time being," for "the burgesses at that time surviving and remaining," will mean "burgesses at that time being," or "for that time being," or "the major part of the same." The difference between the one case and the other is, that in the one, the words are, "the greater part *of them*," and in the other, the "greater part *of the same*." The words "the same," I admit, generally refer to the last antecedent, and I should say that such was the construction which might be

given here, but I think the words "*the same*", may be satisfied by referring them to the words "the same, or the major part of the capital burgesses surviving and remaining;" and if they are equivocal, and may be referred to one or the other, then the general rule established in *Rex* v. *Bower* should be adopted, and consequently this case governed by that decision.

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Holroyd, J.—I think this case comes distinctly within the principle of *Rex* v. *Bower*. There the Court construed the words "or the greater part of them" not to refer to the antecedent passage, "for the time being," but to the whole number of the definite body. Upon the same principle we must in this case construe the words "greater part *of the same*," in like manner as the words "greater part *of them*." Our judgment in the present case will not decide, that if the whole surviving body of capital burgesses be less than the majority of twenty-four, they may or may not have the power of election by this charter; for it seems to me, that in order to render this election valid by a majority of the capital burgesses, the words "the greater part of the same," must have reference to the major part of the whole elective body; and as this defendant has not been elected by the major part of the elective body, I think judgment must be given for the Crown (*a*).

On a subsequent day, *Abbott*, C. J., delivered the opinion of the Court more elaborately in favor of the Crown.

Judgment for the King.

(*a*) *Best*, J. was absent.

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## The King *v.* Richard Devonshire.

THIS was a similar proceeding upon the same charter, under circumstances somewhat different, but the main question being the same as in the case above mentioned, the like judgment was given.

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## The Earl of SHAFTESBURY and Others v. RUSSELL (a).

The collector of the personal assessed taxes may, by 43 G. 3. c. 99. s. 33. distrain "the *person* or *persons* so charged, by *his* or *their* goods and chattels, and all such other goods and chattels as they are by that statute authorised to distrain;" and by s. 38. the remedies given by the bankrupt laws, &c., are extended to the collector, for enforcing the payment of the same taxes. Where the Duke of *M.* was by the trusts of his father's will, allowed to use the furniture in the mansion of *B.* during his natural life, and was prohibited from removing it thence, without the consent of the trustees:—Held, that such furniture could not be distrained for the Duke's personal taxes returned as payable at the mansion of *B.*, and that it did not fall within the description of such "other goods and chattels," as might be distrained by force of s. 38:—Held also, that the jurisdiction of this Court to try the legality of a distress upon the goods of *A.* for an assessment upon *B.*, was not taken away by s. 3. which enacts, that "if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners."

CASE for an excessive distress for assessed taxes. The first count of the declaration stated, that plaintiffs were owners and proprietors under and for certain trusts, of certain goods and chattels, consisting of household furniture, pictures, prints, statues, and busts, in and upon the mansion-house of *Blenheim*, and which were held and enjoyed by the Duke of *Marlborough* under the trusts, with the consent and permission of the plaintiffs; that defendant was the collector of certain taxes and duties payable to his majesty, for a division or place which included the said mansion house; that certain taxes and duties upon windows, inhabited houses, male servants, carriages, horses, dogs, hair powder, and armorial bearings, had been assessed upon the said Duke, and were due from him to his majesty, and the said taxes and duties upon windows and inhabited houses, amounting to 672*l.* 15*s.* 6*d.* were due in respect of the mansion-house, and the rest of the taxes assessed upon the other articles, amounting to 1207*l.* 15*s.* were returned by the said Duke to be paid for at *Blenheim*. The declaration then stated, that defendant, under pretence that he was authorised to distrain upon the said goods and chattels for the whole of the said taxes and duties, seized and carried them away, as a distress, as well for the taxes and duties upon windows and inhabited houses, as also for the taxes

(a) The King's warrant having issued in *Easter* Term, pursuant to 3 *Geo.* 4. c. 102. authorising any two or more of the Judges of this Court to sit for the despatch of business, from *Wednesday* the 21st, until *Thursday* the 29th of *May*, both days inclusive, *Bayley*, *Holroyd*, and *Best*, Js. accordingly sat in the room adjoining the Court House of the *Guildhall*, *Westminster*, and this and the following cases, ending with *Priddy* v. *Henbury*, *post*, were determined.

and duties upon male servants, &c.; and that the said goods and chattels were of much greater value, and more than sufficient to satisfy the duties upon windows and inhabited houses, together with the costs and charges of the distress. There were other special counts in the declaration, and also a count in trover. Plea, not guilty, and issue thereon.

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At the trial, before *Abbott*, C. J., at the Sittings in *Middlesex*, in *Easter* Term, 1822, a verdict was found for the plaintiff, with damages, subject to the opinion of the Court, on the following case:—

*George*, late Duke of *Marlborough*, was in his life-time, and up to the time of his death, owner of the goods and chattels mentioned in the declaration, and was seised of the mansion-house of *Blenheim* for the term of his natural life, and by his will, dated 3rd *March*, 1812, bequeathed the said goods and chattels amongst other things to the plaintiffs, his trustees, upon trust, to permit the same to be held and enjoyed, so far as the rules of law and equity would admit, by the person or persons, who, for the time being, should be entitled to the possession of his freehold estates thereinbefore devised to the Marquis of *Blandford*, now Duke of *Marlborough*, for his life, with such remainders over as therein mentioned. The testator then directed, that whilst his freehold estates should, under the limitations in his will, belong to, and be held and enjoyed by the person or persons entitled by act of parliament to his mansion-house, garden, and pleasure grounds at *Blenheim*, the said chattels should be kept and preserved at or in the same mansion-house, &c., and should not be removed therefrom, unless with the consent of the trustees; and the testator appointed his trustees executors of his will. Upon the death of the late Duke, the present Duke of *Marlborough* became seised of the said mansion-house for the term of his natural life, and he has ever since occupied, and still continues to occupy the same, and to use and enjoy the said goods and chattels. The defendant, at the time of the seizure in question, was the collector of certain duties payable to his majesty by

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43 *Geo.* 3. c. 99. 43 *Geo.* 3. c. 161. and other subsequent acts, and the other duties of assessed taxes for the division and place of *Blenheim*, and had the usual warrants of the commissioners acting under the said acts, delivered to him at the time of his appointment. At the time of seizing the said goods and chattels, the window taxes and duties amounting to the sum of 672*l.* 15*s.* 6*d.* were assessed and charged upon and were due from the said Duke, for and in respect of the said mansion-house at *Blenheim*, and the rest of the said taxes and duties were assessed upon male servants, &c. and were returned by the present Duke to be paid for at *Blenheim*. Before any distress was made, defendant made a demand of the arrears as they became due, of the present Duke, and required him to pay the same, but he did not at any time pay them. On the 10th *May*, 1821, the goods and chattels in question were seized by defendant for the said several and respective taxes, which goods and chattels were much more than sufficient in value to satisfy the amount of the taxes and duties upon windows and inhabited houses, together with a reasonable sum for the costs and charges of making the distress. The said plaintiffs, after the seizing, tendered defendant the sum of 672*l.* 15*s.* 6*d.* the amount of the house and window taxes, and also the sum of 50*l.* for the expences of distraining such part of the goods and chattels as were necessary to be sold for the payment of those taxes, and required him to deliver the goods and chattels so seized, but he refused so to do. The present action was commenced within the prescribed period of limitation, and proper notice of such action was given.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover? If the Court shall be of opinion that they are, the present verdict to stand, if otherwise, a nonsuit to be entered.

*Rogers*, for the plaintiffs. It is conceded, that the duties payable in this case upon inhabited houses and windows,

may be distrained for in the mansion of *Blenheim*, but the question is, whether the defendant had a right to seize these goods for the taxes assessed *personally* upon the present Duke of *Marlborough;* and that question arises upon the 43 *Geo.* 3. c. 99. s. 33. which provides the remedies for enforcing payment of the several taxes assessed by virtue of that statute. For the house and window duties, the collectors are authorized to distrain upon the messuages, lands, tenements, and premises charged therewith; and for the personal taxes, as for male servants, &c., they are authorised to distrain "the person or persons so charged, by *his* or *their goods and chattels.*" To establish the legality of this distress, therefore, which was for a personal assessment upon the Duke of *Marlborough*, it must be shewn, that the goods and chattels in question were his property. Now the case expressly finds, that the goods and chattels in question are not the property of the Duke of *Marlborough*, nor has he even the possession of them in the proper sense of the word—he has merely the liberty to use them, and it is a part of the trust, that they shall continue on the premises. By no part of the will of the late Duke, has the present Duke any property in them, nor has he even any right to the possession for the purpose of removal. For this, *Cadogan* v. *Kennett* (a), is an authority. The devise in this case is in the first instance, to the trustees absolutely, to the use of the person who, for the time being, should be entitled to the possession of the freehold estates devised by the late Duke, to hold and enjoy them, so far as the rules of law and equity will permit. This shews plainly that the present Duke is to have neither the property nor the possession of the goods, for if he had any possession or property in them, the words which follow would have been unnecessary, namely, "that they shall not be removed therefrom, unless with the consent of the trustees." The whole property, therefore, in these goods is vested in the trustees; and as the act of parliament only

(a) Cowp. 432.

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authorises the distress upon the goods and chattels of *the person* charged and assessed, this distress is illegal, being upon goods and chattels in which the person assessed had no property.

*Parke*, contrà, made two points; first, that by ss. 33 and 38, the goods and chattels in question might lawfully be distrained by the defendant, for the personal assessment upon the Duke of *Marlborough*; and second, that this Court had no jurisdiction to entertain the question. As to the first point, s. 33, after authorising the collectors "to distrain upon the messuages, &c. charged with any sum or sums of money; and to distrain the person or persons charged by his, or their goods and chattels," proceeded "and all *such* other goods and chattels, as they are hereby authorised to distrain." Now by force of these last words, coupled with s. 38, the goods in question would fall within the description of "*such* other goods and chattels," as the collector was authorised to distrain. By the last-mentioned section, all remedies given by the bankrupt laws, and certain acts therein mentioned, are extended to the commissioners and other persons acting under the authority of the 43 *Geo.* 3. c. 99, for enforcing the payment of assessed taxes. If then the Duke of *Marlborough* were liable to the bankrupt laws, and had become a bankrupt, the same remedies would be given to the commissioners of assessed taxes for enforcing the payment of these duties, as were given to commissioners of bankrupt for recovering a bankrupt's effects. Arguing upon this principle, he contended that the words "*such* other goods and chattels," in s. 38, meant such goods and chattels as were in the possession of the party, with the consent of the true owner, and which would pass to the assignees of a bankrupt by force of 21 *Jac.* 1. c. 19. s. 11. He apprehended there was no doubt, that if the Duke of *Marlborough* had become a bankrupt, these goods would pass to his assignees, inasmuch as he had the possession and apparent disposition of

the property, with the consent and permission of the true owner; and though his Grace was not liable to the bankrupt laws, yet the principle was the same, and therefore that the words "*such* other goods and chattels" were satisfied by reference to the authority given to the commissioners by the 38th section. Upon this point he cited *Lingham* v. *Biggs*(a), *Kidd* v. *Rawlinson*(b), *Lingard* v. *Messiter*(c), *Kirkley* v. *Hodgson*(d), and *Juson* v. *Dixon*(e). Then as to the second point, he insisted that this action could not be maintained in this Court, inasmuch as by s. 33, it was expressly enacted, that "if any question or difference shall arise upon taking such distress, the same *shall be determined and ended by two or more of such commissioners.*" These words, he contended, were compulsory, and deprived this Court of all jurisdiction.

*Rogers*, in reply, was stopped by the Court.

BAYLEY, J.—We should be very glad, if by law these goods could be distrained; but we are to act upon general rules, and this being a distress for taxes, which are not charged upon the premises but upon the person of the individual liable to pay, we are to see whether the law has given the remedy exercised in this particular instance. The question arises upon the 43 *Geo.* 3. c. 99. s. 33. In that section there are three classes of remedies given for the recovery of the assessed taxes. First, the collectors are authorised to distrain "upon the messuages, lands, tenements, and premises charged with any sum or sums of money;" secondly, they may distrain the *person* or *persons charged*, by *his* or *their goods and chattels.*" Then comes a third power of distress, namely, "upon all *such* other goods and chattels as they are hereby authorised to distrain." In order to justify the distress in question, which

(a) 1 Bos. & Pul. 82.
(b) 2 Id. 59.
(c) Ante, vol. ii. 495.
(d) Ante, vol. ii. 848.
(e) 1 M. & S. 601.

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is upon the goods and chattels of the plaintiffs, in respect of a tax charged not upon them, but upon the Duke of *Marlborough*, we are to see what other goods and chattels the collectors are authorized to distrain. Our attention has been directed to s. 38, which provides, "That all remedies given by any act concerning bankrupts, or concerning the method of recovering rent in arrear, and the powers given by 27 *Geo.* 2. c. 20, and 33 *Geo.* 3. c. 55, shall be used by the commissioners, collectors, &c. in recovering any arrears of duties assessed under this act." It is insisted, that this would be a case in which, if the individual had become a bankrupt, his assignees would have been entitled to take these goods, upon the ground, that under the 21 *Jac.* 1. c. 19. s. 11, they were in the order and disposition of the Duke of *Marlborough*, with the consent of the true owner and proprietor. Without at present considering whether s. 38 would give the collector the power of seizing, in the case of a bankrupt having goods in his order and disposition, with the consent of the true owner, I have no difficulty in saying, that, according to decided cases, if the Duke were subject to the bankrupt laws, he could not be considered as having the order and disposition of the goods in question. There are two cases, namely, *Jarman* v. *Woollaton* (a), and *Darby* v. *Smith* (b), in support of this position. In the former, a woman before her marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees to enable her to carry on her business separately, and the husband having afterwards become bankrupt, the assignees seized the property, and the trustees having brought trover, the Court held, it would lie. Why? Because the goods never had been originally the property of the husband. Whoever traced the property into the possession of the husband, would have seen that it came to him on his marriage, that it had been the property of the wife, and that it had been the subject of settlement, and so could not be touched by the

(a) 3 T. R. 613. (b) 3 T. R. 82.

assignees. It is true, in *Darby* v. *Smith*, the Court decided that the assignees were entitled to the possession of the property, but that was not on the ground that the husband was to be considered the true owner in all cases, but because the trustees there had suffered the husband to have the possession and apparent ownership. The husband was entitled to have the possession so long as he should make from time to time certain payments. He did not make the payments, and notwithstanding that, the trustees, contrary to their duty, allowed him to retain the possession of the property; and, consequently, it was held subject to the bankrupt laws. In the present case, those who would have taken the trouble of tracing this property to the period at which it came into possession of the present Duke, would have seen, that it belonged to the former Duke; that it was the furniture with which the house had been furnished whilst he resided in it, and that he had made some disposition of it by will. They would have found that the Duke of *Marlborough* had no more power or control over the furniture than any man renting a ready-furnished house. It is true, he had the use of the furniture, but the trustees had the absolute property in it; and they could not suffer him to have any possession or apparent ownership, or order and disposition, inconsistent with their trust. I am therefore of opinion, that these goods were illegally distrained for the Duke's personal taxes. The second objection urged is, that the words at the close of s. 3; "and if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners," exclude the jurisdiction of this Court. It is said, this is an imperative provision, and that this is a dispute which should have been ended and determined by the commissioners only. Now, in a case of this description, there should be clear and unqualified words, shewing, not a doubtful, but a distinct intention, on the part of the legislature, to take away the jurisdiction of the superior courts; for if we were to give effect to these words to the extent contended for, we should

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not only supersede the decision of a court of common law, but deprive the party of having that decision reviewed by a court of error, which is one of the privileges which he would have in an ordinary case. If that is the true construction of this clause, I am surprised that it never was taken in *Juson* v. *Dixon* (a), for although in that case there was another answer to the action, yet this objection, if tenable, would most probably have been urged. Upon looking to the words of the clause, however, I am satisfied that it does not apply to a case of this description. Where the collector makes a distress upon the goods and chattels of a party *liable*, the commissioners have the power of deciding any dispute respecting it; but where he seizes the goods of *A.* under a power to seize the goods of *B.*, and *B.* only, I am of opinion that it is not such a question or difference arising upon taking the distress, as would exclude the jurisdiction of the courts of law, and confine the determination of the question to the consideration of the commissioners only. On these grounds I think the plaintiffs entitled to judgment,

HOLROYD, J.—I am of the same opinion. In cases where the certiorari is supposed to be taken away, it has been expressly held, that, in order to supersede the jurisdiction of a superior court, the certiorari must be taken away by express words, or by such words as that the intention of the legislature could not be carried into effect, without giving such a construction to the statute. *Coates* v. *Knight* (b). Words of permission may be construed as obligatory, and words that are partly obligatory, may be construed as words of direction and permission only, in order to make that lawful which otherwise would not have been considered so by the act of parliament. In that sense, the latter part of s. 33. is to be construed, inasmuch as there is nothing to shew that the ordinary jurisdiction of the superior courts was meant to be taken away. We are to

(a) 1 M. & S. 601. (b) 3 T. R. 442.




construe this section as if the words were "*It shall be lawful* for the commissioners to determine any question or difference that shall arise upon taking the distress." The clause gives them power and authority to determine any dispute respecting the distress, but does not give them an exclusive jurisdiction. It is clear to me, therefore, that this section does not deprive a court of law of jurisdiction over the question which arises in the present case. As to the other question, which is the most important, whether these goods were such as could lawfully be distrained under the authority of s. 33; I am of opinion that the words "to distrain the person or persons so charged, by his or their goods and chattels, and all such other goods and chattels as they are hereby authorised to distrain," must be construed to apply to the goods and chattels of the person distrained upon, and to none other. The question then is, whether these were the goods and chattels of the Duke of *Marlborough*. Clearly they were not. He had the custody of them, with the consent of the trustees, but they were not his goods and chattels. But it is said, that the case comes within s. 38 Without, however, determining whether the goods of a person in the situation to which this section refers, would come within the jurisdiction of the commissioners, I am clearly of opinion, that if the Duke of *Marlborough* was a trader, and had committed an act of bankruptcy, these could not be taken as his goods by the assignees. The words of the statute 21 *Jac.* c. 19. s. 11. are, "the consent and permission of the true owner;" but in the execution of their trust, the trustees were bound to let the Duke have the enjoyment of the furniture at *Blenheim* house, and, therefore, their consent and permission could not be considered voluntary. If, by the voluntary act of the true owner, a man is in possession under such circumstances as may reasonably induce the world to believe that he has the order and disposition of the goods, that may be a case coming within the statute. But the case of *Jarman* v. *Woollaton* is not only decisive of this question,

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but is even a stronger case than the present, because in that case, upon the marriage of the woman, by which in general her property would become that of the husband, the husband continued to enjoy the property in like manner as if no conveyance to trustees had taken place, and, therefore, the world might naturally presume that the possession of the property was that which the law gave him by virtue of the marriage. In this case the property belonged to the late Duke, it did not go to the present Duke; but to the executors of his father's will. No act was done to give him the legal ownership; he is the mere cestui que trust for the particular purposes of the will. The defendant, therefore, had no authority to distrain the goods, and consequently the present action is maintainable.

BEST, J.—I have been endeavouring to find out some ground to decide this case in favor of the defendant, in order that a person who enjoys those signal advantages which belong to the first rank of nobility in the realm, should, by some means, be compelled to pay those taxes and burthens for the support of that state to which he and his family are under such infinite obligations. Whatever may be my wishes however, upon the subject, it is impossible that this Duke can be compelled to pay these taxes, although he keeps up an establishment so large, as that, by some means or other, his assessment amounts to 672*l.* per annum. I am of opinion, that he stands merely in the situation of a person having a ready-furnished house for his life; he is assessed for his personal taxes, and the question arises upon the authority given by the statute to distrain for those taxes. Whoever looks to the act of parliament, will find that it is not a bare possession that will authorise a distress for the goods, unless it is coupled with such circumstances as shew, that the person possessing, has also the order and disposition of them. He must not only be in possession, but he must have the apparent order and disposition; he must take upon himself "the sale, alteration, or disposition as owner." The

Duke of *Marlborough* has the possession of these goods beyond all doubt, but it is a bare possession. Finding them in the house will not justify the seizure. Has he the power of altering the state of the property? Certainly not. He has merely the bare possession, as if he were the tenant of a ready-furnished house. Does every man who takes a ready-furnished house, and becomes a bankrupt, thereby subject his landlord's goods to be seized by his assignees? Clearly not. If the Duke had the power of selling, altering, or disposing of the goods, undoubtedly they would be liable to distress; but all these requisites are necessary for the purpose of bringing the case within the act of parliament. Then as to the second objection, I think it is not well founded. It is a clear and undoubted principle of law, that the jurisdiction of the superior courts cannot be ousted unless by express terms, or necessary implication. Here are no express terms or necessary implication, excluding the jurisdiction of this Court. In many cases, authority is given to the Quarter Sessions to decide finally, and yet the certiorari is not taken away. In such cases the certiorari may still be obtained, and that is a stronger case than the present. This is a cumulative remedy which the common law had given before, and there being no express words or necessary implication in this act, I think the Court has jurisdiction to determine this question; and being of opinion that the action may be maintained, the postea must be delivered to the plaintiffs.

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Postea to the plaintiffs.

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Hustings erected to take the poll at a contested election for members to serve in parliament, are not *a building* within 57 *Geo.* 3. c. 19. s. 38, and therefore no action lies against the hundred for the destruction of such property by a tumultuous assembly. Where hustings erected at the expence of the candidates at a contested election, were damaged by a riotous assembly, and were afterwards repaired at their expence:— Held, that no action lay at the suit of the returning officer, against the hundred.

DEBT, on 57 *Geo.* 3. c. 19. s. 38, against two inhabitants of the borough of *Lynn*, in the county of *Norfolk*, for the destruction, by a riotous assembly, of a building, the property of the plaintiff, erected for the election of burgesses to serve in parliament for the said borough. At the trial before *Garrow*, B., at the last *Lent* Assizes for the county of *Norfolk*, it appeared in evidence that the building mentioned in the declaration consisted of hustings, which had been erected at the expence of the candidates, for the purpose of taking the poll at the last election for *Lynn*. In the course of the election, considerable damage was done to the hustings by a riotous mob, and plaintiff being mayor and returning officer of the borough, caused them to be repaired at his own expence, for the purpose of completing the election, but was afterwards reimbursed by the candidates. The object of the action was to recover the amount of the carpenter's bill on that occasion. The hustings were constructed with planks of timber, supported by poles and stakes driven into the ground to the depth of four feet. It was objected for the defendant, first, that the hustings were not *a building* within the meaning of the statute; and second, that the plaintiff was not the person interested in, or damnified by the riotous act alleged, and consequently could not maintain the action. The learned Judge over-ruled both objections, and the plaintiff had a verdict, with liberty to the defendants to move the Court.

*H. Cooper*, in *Easter* Term last, having obtained a rule nisi to enter a nonsuit,

*Storks* and *M. West* now shewed cause. Neither of these objections is available to the defendants. First, "hustings"

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are a building within the words, and certainly within the spirit of the statute. The words of s. 38, are, "any house, shop, or *other building whatever*." A liberal construction must be put upon this statute, it being remedial and not penal. *Ratcliffe* v. *Eden* (a), decides that the Riot Act, 1 *Geo.* 1. stat. 2. c. 5. is a remedial statute. This act was passed to amend the Riot Act, and, à fortiori ought to receive a liberal construction. The manner in which the hustings were built, evidently gave it the character of a building. They were built with great strength and firmness; they were attached to the soil by poles sunk to the depth of four feet, and were of such a nature that a shop or dwelling house so erected, would endure for many years. Building is a nomen generalissimum. According to *Johnson*'s definition, "building," is "a fabric, an edifice, structure, constructure, &c." It is obvious, that the legislature in framing this statute, intended to embrace every species of edifice exposed to the violence of a tumultuous assembly. These hustings, therefore, answer the description of a building. Then, secondly, though there be no decision which imposes upon the returning officer of a borough, the burthen of erecting hustings, yet the plaintiff in this case, by virtue of his office, had such an interest in the hustings, after they were erected, as would enable him to maintain this action. It was his duty to make the return; but he could not do so unless the hustings were repaired, so as to enable him to take the poll. The election could not proceed until the hustings were repaired, and, therefore, by the act of the mob, he was incidentally damnified by the interruption of his proceedings. In this point of view, he clearly had such an interest in the hustings as qualified him to maintain this action.

*H. Cooper* and *Parke*, contrà, were stopped by the Court.

(a) Cowp. 485. See Doug. 699.

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PER CURIAM.—Either of these objections presents an insuperable difficulty. First, "hustings," are clearly not a building, within the intent and meaning of the legislature. The statute clearly defines the nature of the buildings to which it was intended to afford protection, namely, "houses, shops, or other buildings whatever," i. e. buildings, ejusdem generis; but hustings do not answer the description of a building within this definition, which clearly refers to edifices of a substantial and permanent nature. If we were to hold this erection to be a building within the meaning of the statute, the remedy might be extended to a stall or a booth in a fair, which would be a monstrous absurdity. The second objection is equally fatal. No case has been cited to shew that there is any obligation upon the returning officer to erect hustings, and there is nothing to shew that the plaintiff in this case had any interest whatever in the erection. Suppose these hustings had remained uninjured to the end of the election, what interest would the mayor have had in them? None whatever. They were the property of the candidates, who were liable to pay, and did pay the expence of erecting them, and the injury complained of falls upon the candidates and not upon the plaintiff. The declaration alleges the property of the hustings to be in the plaintiff, which is negatived by the evidence. It does not state, that "whereas the said building had been erected, and plaintiff being mayor and returning officer, was in such a situation that when the building was broken down and destroyed, he, as returning officer, was bound to erect other hustings, or to repair those which had been injured." This is a naked allegation that the building was his, which turns out not to be the fact, and therefore this action fails.

Rule absolute (*a*).

(*a*) Vide *Jackson* v. *Pearson*, ante, vol. ii. 439. *Morris* v. *Lord Cochrane*, 1 M. & S. 283. *Morris* v. *Burdett*, 2 M. & S. 212, and 51 Geo. 3. c. 126.

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INDEBITATUS assumpsit for 260*l.* for and in respect of divers tenements, rents, and premises bargained and sold by plaintiff to defendant, and thereupon, in consideration that plaintiff would take the work and labour of defendant, as plumber and glazier, at reasonable prices, to the extent of the said debt, in payment and satisfaction thereof, defendant undertook to do and perform for plaintiff all such work and labour as plaintiff might require, to the extent of the said debt. Averment by plaintiff, that he was always ready and willing to take such work of defendant, and from time to time requested defendant to perform the same to an extent not exceeding the said debt. Breach, that defendant would not perform such work, but wholly refused so to do. Second count the same, only stating the money to be due generally. Third count, that defendant was indebted to plaintiff in, &c. "for divers, to wit, ten acres of ground, and ten messuages or tenements and premises, with the appurtenances, of plaintiff, and a certain fee farm rent of plaintiff, bargained, sold, and released by plaintiff to defendant. Fourth count, a quantum meruit thereon. Fifth and sixth counts, indebitatus assumpsit for a certain plot of ground, and divers, to wit, ten other messuages, tenements,

*A.* by deeds of assignment and bargain and sale, assigned and sold respectively, an unexpired lease of premises, and the fee-simple of a messuage, &c. to *B.*, and in each instrument recited that he had received the purchase money, and on the back of each, wrote a receipt for the purchase money in full. After which, a memorandum of agreement not signed or stamped, was drawn up between the parties, reciting that *B.* had lately purchased of *A.* the premises in question, and that *A.* being indebted to *B.* in the sum of 100*l.*, had agreed that the same should be considered as part payment of the said purchase money, but it being understood that in case the dividend about to be paid by *A.* to his creditors should not amount to 20 shillings in the pound, then *A.* was to do work for *B.* in his line of a builder, to the amount of such deficiency; and further, that *B.* was to retain in his hands the sum of 60*l.*, to be also considered as part payment of the said purchase money, and for which said sum *B.* was to do and perform work for *A.* in his line of a plumber and glazier. Indebitatus assumpsit being brought by *A.* to recover the money actually due to him, as the purchase money of the premises in question, the declaration alleging that the sum was due for and in respect of divers tenements, &c. sold by plaintiff to defendant, and thereupon, in consideration that plaintiff would take the work and labour of defendant as plumber and glazier, at reasonable prices, to the extent of the said debt, in payment and satisfaction thereof, defendant undertook to do and perform for plaintiff, all such work and labour as he might require, to the extent of said debt, averring readiness of plaintiff to receive the work, and refusal of defendant to perform it:—Held, that neither the agreement nor parol evidence of the contents, was admissible to shew that the consideration money had not been paid.

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and rents bargained, sold, and assigned by plaintiff to defendant, and a quantum meruit thereon, with the money counts. The defendants pleaded the general issue, with notice of set off, in respect of work and labour performed, and materials found by defendant for plaintiff; and for goods sold and delivered, and for money lent, &c., meeting the money counts. At the trial, before *Richardson*, J., at the last *Summer* Assizes for the county of *Somerset*, the following documents were put in on the part of the plaintiff. First, an indenture of assignment, dated 25th *March*, 1820, stating, that in consideration of the sum of 50*l.* paid by defendant to plaintiff, the receipt of which sum was thereby acknowledged, and the defendant therefrom acquitted and released, the plaintiff sold to defendant a plot of ground in, &c., and also a messuage, &c., to hold for the remainder of a term of twenty-one years not then expired. Upon this indenture the following receipt was indorsed: "Received on the day of the date of the within written indenture, of and from the within named *John Dewey*, (the defendant), the sum of 50*l.* being the consideration money to be paid by him to me. *W. Baker*, (the plaintiff.) Witness, *Joseph Clark*." Second, an indenture of lease and release, dated 28th *August*, 1820, made between the plaintiff of the first part, three other persons therein named of the second, third and fourth parts, the defendant of the fifth part, and *W. Owen*, a trustee for the defendant, of the sixth part, which stated that the plaintiff, in consideration of the sum of 250*l.* to him in hand paid by the defendant, the receipt whereof was thereby acknowledged, and the defendant therefrom acquitted and released, did, and the said other parties by the plaintiff's direction, did sell, &c. to defendant and his trustees, a messuage, situate, &c., to hold in fee: And also that plaintiff in consideration of 60*l.*, the receipt of which was also acknowledged, and defendant released therefrom, did convey to defendant and to his use, a certain fee farm rent, issuing out of the same premises, and the same rent was thereby merged in the fee. Upon this

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indenture the following receipt was indorsed: "Received on the day of the date of the within written indenture, of and from the within named *John Dewey*, the several sums of 250*l.* and 60*l.* being the respective consideration monies within mentioned, to be paid by him to me, *W. Baker.* Witness, *Edward Smith, Thomas Maybin.*" General evidence was then adduced of the defendant's promise to do the work described in the declaration, and of his subsequent refusal to complete it; and then, in order to shew that there was still money owing from the defendant to the plaintiff, so as to support the action, the following agreement was produced, and parol evidence of the circumstances under which it was made, adduced. "Whereas the undersigned *John Dewey* hath lately purchased of the undersigned *William Baker*, a messuage, being, &c. for the sum of 310*l.* And whereas the said *W. B.* being indebted to the said *J. D.* in the sum of 100*l.*, he hath agreed that the same shall be considered as part payment of the said purchase money. But it is hereby understood, that in case the dividend about to be paid by the said *W. B.* to his creditors, shall not extend so as to pay 20 shillings in the pound, then the said *W. B.* is to do work for the said *J. D.* in his line of a builder, to the amount of such deficiency. And further, that the said *J. D.* is to retain in his hands the sum of 60*l.*, to be also considered as part payment of the said purchase money, and for which said sum he, the said *J. D.* is to do and perform work for the said *W. B.* in his line of a plumber and glazier, to the amount thereof. *W. Baker, John Dewey.*" This agreement had no stamp, and bore no date, and was objected to on the part of the defendant as inadmissible, as well on that ground, as from its being contradictory of the deeds. Parol evidence to shew the substance of the agreement was also objected to for the latter reason. The learned Judge over-ruled the objection, but reserved the question, and the plaintiff had a verdict for 110*l.* with liberty to the defendant to move to enter a nonsuit.

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In *Michaelmas* Term last, *Gaselee* obtained a rule nisi accordingly, and cited *Rowntree* v. *Jacob* (a).

*R. Bayly* now shewed cause. This rule was moved for on the ground that the second lease shewing upon the face of it, that the money had been received by the plaintiff, no parol evidence was admissible on his part to contradict that fact. The case of *Rowntree* v. *Jacob* is no authority in support of this motion, because the circumstances there were materially different. In that case, parol evidence was admitted on both sides, for and against the validity of the deed; and the decision there rested upon the fact that the deed operated as a release of all demands by the plaintiff, which he could not afterwards be allowed to revoke. But the present case stands upon a very different footing. The question here is, whether the rejected evidence was in fact contradictory of the language of the deed, because, if it was not, it was clearly admissible. There is no contradiction. The lease alleges, that this money was received in full; the agreement went to shew that it was allowed in account, but an allowance in account is a payment, both at law and in equity, *Jeffs* v. *Wood* (b), and therefore this was a part payment, and would appear so to have been by the rejected evidence, which would have supported the deed, by shewing that part of the money had been paid, and would have explained it only by shewing that a balance still remained due; for which purpose it was properly admissible. Such evidence would have supported the first count of the declaration, and the count for money had and received. The first count states the debt to be "For and in respect of tenements, &c. sold to the defendant;" the debt is not stated as the purchase money; but in the deeds, the sums released are expressly released as the purchase money, and in that respect alone. But, beside this, the deeds bear date in *August*, 1820, whereas it was

(a) 2 Taunt. 141. (b) 2 P. Wms. 129.




in evidence at the trial, that they were not executed by the defendant until *March*, 1821; and therefore, until that latter period, when they were made complete by the execution of all the parties, they could not be in force, or operate as deeds at all. If these deeds are to operate against the plaintiff as a bar to this action, they amount in fact to a gross fraud upon him, in support of which the Court will not lend themselves, if it be possible to avoid it. The deeds themselves cannot amount to an estoppel without express receipts, because they only recite the payment as a thing to be done, and the receipts cannot have that effect, because they are not part of the deeds, and are not under seal; they are mere memoranda upon the back of, and dehors the deeds. In *Goddard's* case (*a*), it is said, an obligee is estopped from taking an averment against any thing expressed in the deed; but the receipt here is not a thing expressed in the deed; and therefore, that rule cannot apply to the present case. The same distinction seems also to be recognized in several other cases, *Kempe* v. *Goodall* (*b*), *Maby* v. *Shepherd* (*c*), *Iseham* v. *Morrice* (*d*), and *Skipworth* v. *Green* (*e*). Upon these authorities the plaintiff is not estopped from traversing the payment of this debt as it appears upon the deeds, and the evidence produced to prove an existing debt, was admissible.

*Gaslee* and *C. F. Williams*, contrà, were stopped by the Court.

BAYLEY, J.—I am of opinion that this rule must be made absolute. We may lament the effect of this decision, as being contrary to the justice of the case, but we are bound by the rules of law. There is no principle more clearly established than that when a party has executed a

(*a*) 2 Rep. 4.
(*b*) 2 Ld. Raym. 1154.
(*c*) Cro. Jac. 640.
(*d*) Cro. Car. 109.
(*e*) 8 Mod. 311.

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deed by which he declares that he has received a certain sum of money, he is for ever estopped from saying that the deed is false. What is the language of the lease and release here? "In consideration of the sum of 250*l.* to the plaintiff *in hand, well and truly paid*;" the same language is used in reference to the sum of 60*l.* The plaintiff declares that the money has been well and truly paid to him, and he cannot now be allowed to traverse that admission, and say he has never received it. With respect therefore to the memorandum of agreement, for it is no more, it certainly ought not to have been received in evidence as against the solemn deed of the plaintiff. If there had been a count in the declaration averring that at the time when the deed was executed there existed a parol agreement between the parties, that a portion of the money should be considered as returned, perhaps the plaintiff might have been permitted to offer evidence in support of that averment, but there is no count to meet that case. The first count clearly turned out to be untrue, because the deed shews that the defendant was *not* then indebted to the plaintiff "for or in respect of tenements, &c. bargained and sold to him." The second count is equally unsupported, because there was no general debt existing, nor is there any count in the declaration made out by the evidence. I am therefore of opinion, that the plaintiff being estopped from contradicting his own deed, was not entitled to produce evidence of the subsequent parol agreement, and consequently a nonsuit must be entered.

HOLROYD, J.—I am of the same opinion. The second count seems most strongly relied on, and perhaps it cannot be said that the memorandum of agreement which was adduced in support of that count was inconsistent with the deed, but I think it was insufficient to support the count. One stipulation of the agreement is, that the plaintiff shall be paid, not in money, but by work to be performed; the

deed acknowledges the receipt of the whole debt; there is no evidence of any subsequent loan of money so as to create a new debt, which appears by the deed to have been satisfied, and which, therefore, however justly still due, cannot be recovered under that count, or the agreement to support it. I remember a case in which goods were sold at *one* month's credit, and a bill for the payment was given at *two* month's date, and I was in the first instance inclined to think that the agreement for the limitation of the credit created a debt at the end of the first month. A different opinion, however, was entertained both by this Court and by the Court of Common Pleas; and it was held, that in all such cases, unless the whole time had expired, the liability did not accrue, and at least, that a special declaration was necessary (*a*). That rule applies directly to the present case as respects the second count, because the whole period for performing the work has not expired, and the alternative of paying in money has not come into operation. There has been a demand made upon the defendant to do the whole of the work, but that will not create a new debt; part of the work has been done; there is an unliquidated amount remaining undone; so that, with respect to that, there is no assumpsit by the defendant, nor any money had and received by him to the plaintiff's use. The only breach is the non-performance of the work, and for that the plaintiff has no remedy in the present mode of declaring; he must resort to his special action.

BEST, J.—I am clearly of opinion, that the parol evidence in this case was inconsistent with the written documents, and therefore inadmissible. If the money, or a portion of it, was really returned to the defendant, or it was agreed between the parties that it should be so considered, then a new contract was formed, upon which the plaintiff would be entitled to sue. But we have no evidence

(*a*) See 1 Esp. 5. 4 East, 147. 3 Bos. & Pul. 582; and Chitty on Bills, 5th edit. 123.

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to that effect before us. The case of *Rowntree* v. *Jacob* is directly in point. These deeds must be construed, in the language of Lord *Mansfield*, "according to their legal operation;" and the legal operation of them certainly is to shew that the plaintiff has received his debt. The recent case of *Lambourne* v. *Cork* (a), is an exception to the general rule upon this subject, and therefore greatly strengthens the application of the rule itself. There the release was "in consideration of the said sum now so paid as hereinbefore is mentioned," and was held to refer, not to an actual payment, but to an agreement to pay in a particular manner and form. But there is no such distinction here, the receipt is unequivocal. In cases of this description, the only ground for the admission of parol evidence, is the existence of fraud; and here, if the deed had been pleaded to the action, and the plaintiff had replied fraud in the deed, evidence to support that replication might have been adduced, and so the case might have assumed a very different complexion. But there is no pretence for supposing any fraud in this case, even sufficient to afford relief in a Court of Equity, much less, therefore, in a Court of Law.

Rule absolute.

(a) Ante, vol. i. 211.

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BUNTER v. WARRE.

In replevin by *A.* for growing crops, the point at issue was, whether *A.* and *B.* were joint tenants to *C.* of the land on which the distress was made:—Held, that *B.* might be examined as a witness to disprove the joint tenancy, not being liable to costs, and that he was at least examinable on the voir dire as to his interest in the event of the suit.

REPLEVIN for growing crops. Avowry that plaintiff and one *Thomas Bunter* held the land on which, &c. as tenants to defendant, that rent was in arrear, and so justifying the distress. There were also other avowries, stating the tenancy to be by the plaintiff alone. Pleas of non tenuit

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to both sets of avowries, and issue thereon. At the trial before *Hullock*, B. at the last *Lent* Assizes for *Somersetshire*, the questions were, first, as to the nature of the tenancy, and secondly, as to the nature of the rent; and the defendant having proved a primâ facie case, establishing a joint occupation by the plaintiff and *Thomas Bunter*, as her tenants, and a holding by them at a rent certain; it was proposed on the part of the plaintiff to call *Thomas Bunter* as a witness, to contradict both those facts. This was objected to on the part of the defendant, on the ground, that the witness was incompetent, being a party on the record, and interested in the event of the suit, because upon the case proved he was a co-lessee with the plaintiff, and therefore liable to him for a contribution, both of the rent in arrear, and the costs of the action. It was then proposed to examine the witness as to these facts on the voir dire, but this being also objected to on the same ground, the learned Judge rejected the witness altogether, and the plaintiff having no other evidence, the defendant had a verdict, with liberty to the plaintiff to move for a new trial, if the Court should be of opinion that the witness was competent.

*Pell*, Serjt. in *Easter* Term last, moved accordingly, and having cited *Bell* v. *Harwood* (a) obtained a rule nisi, against which

*Adam* and *C. F. Williams* now shewed cause. This witness was incompetent on three grounds. First, the verdict in this case would be evidence against him in an action against himself for contribution, both of the rent and the costs; second, he was in fact a party upon the record; and third, he had a direct interest to disprove the defendant's avowry. The substantial issue at the trial was, whether he and the plaintiff were or were not joint tenants to the defendant, at a rent of 600*l.* per annum, and he was pro-

(a) 3 T. R. 301. See *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

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duced expressly to shew that the plaintiff was the sole tenant, and that the rent was less in amount, and fluctuating according to the average prices of corn. It cannot perhaps be contended, that if *Thomas* had been examined, and the plaintiff had obtained a verdict, the record of the judgment would be evidence against *Thomas* in a subsequent action against him by the defendant; but if the defendant had obtained a verdict, that would certainly have been evidence against him as a joint tenant. It was quite clear upon the defendant's evidence, that the plaintiff and *Thomas* were co-lessees, and that the latter claimed the crops with, though not under, the former. *Thomas* was in fact a party on this record, and therefore, as the parties to both suits must be the same, this record would be evidence against him in a second action. The two brothers were in effect partners, and therefore *Thomas* was an incompetent witness. This has been decided with reference to partners in money transactions, *Goodacre* v. *Breame* (a), where it was held by Lord *Kenyon*, that a partner of the defendant cannot be examined as a witness, to prove that he only is liable; and if that rule applies to money partners, why should it not also apply to partners in land? The operation of the evidence would be precisely the same; the situation of the parties is altogether similar; they are both joint contractors, and must be viewed in the same light. It must be admitted, that one joint tenant cannot dispose of the whole interest in the land, in the same way that one partner can dispose of all the partnership property; but there are many acts by which the one may bind the other, as for instance, by payment of rent or other outgoing. In this case, the occupation was clearly joint; the parties were joint contractors; their interest was the same; the goods distrained were their joint property; and the appearance of one in the replevin suit was the appearance of both. *Thomas*, therefore, was decidedly interested in the event of the suit, being liable to *James* as a joint occupier, for his share both of the rent and the costs.

(a) Peake's N. P. C. 174.

*R. Bayly*, in support of the rule. The competency of the witness upon the doubts raised, was entirely a question for the Jury, and he ought at least to have been examined on the voir dire, in order that they might judge of his credibility. Ever since the case of *Bent* v. *Baker* (*a*) was decided, Courts have acted on the principle of suffering the admissibility of witnesses, in cases like the present, to be decided rather by their moral credit than their strict legal competency. The nisi prius case of *Goodacre* v. *Breame* is essentially different from the present, and will not influence the determination of the Court upon this question. Even if this witness were liable for a portion of the rent, that would not render him incompetent, because that fact did not at all depend upon the verdict in the cause. For the costs, it is quite clear that he could not be liable, not being a party on the record, and no case can be found in which a party so circumstanced has been held liable for the costs, and for that reason inadmissible as a witness.

BAYLEY, J.—I am of opinion that this person was a competent witness, and ought to have been admitted. The rule is, that in order to disqualify a witness, it must be shewn that he has a direct interest in the event of the suit. That was not shewn in the present case, it was only assumed. The objections were three; the contingency of a future action against the witness; his supposed liability to his brother, for a contribution of the rent of the premises and of the costs of the present action; and his interest in the event of the present action, supposing the goods distrained to be the joint property of his brother and himself. As to the first point, I think the proceedings in this action would not be evidence, either for or against *Thomas Bunter* in a future action; for that is the criterion of his admissibility. The question here is, as to the nature of the tenure; and the proceedings relative to that question would not be evidence hereafter, because in order to render them evidence, the

(*a*) 3 T. R. 27.

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parties in both suits must be the same, or the party in the second suit must stand in privity with the party in the first. It is reasonable that a man shall not be bound by witnesses whom he has not an opportunity of cross-examining, which *Thomas* would not have had in the present case; he is no party to this suit, nor could he have been made so, for upon the evidence, the goods appear to be the sole property of *James*. Then, secondly, is *Thomas* liable to *James* for a contribution of the rent and costs? For the costs he most clearly is not liable; they arise out of the wrongful act of *James* only, and could attach to no other person. As to the rent, the argument assumes that *Thomas* was a joint tenant with *James*, but there is no evidence of the fact; and the only evidence by which the fact could have been ascertained, namely, that of *Thomas* on the voir dire, was rejected. That evidence, I am clearly of opinion, ought to have been admitted. It was in the power of *Thomas* to state how that fact was, and he had a right to state it; it is the constant practice in such cases to examine the witness on the voir dire, as to the facts upon which his competency depends, and it is a proper and necessary course to pursue. In answer to this it is said, that his evidence, even on the voir dire, would have gone to contradict the lease, and was therefore inadmissible; but that answer does not avail, because it was proved that he had never executed the lease, but had positively refused so to do, and that he had never in any manner assented to it, or acted under it.

HOLROYD, J.—I think the witness rejected on the former trial was not incompetent, on any of the grounds suggested in argument. The verdict in this suit cannot possibly be evidence for or against him in any future action. He would not be liable to contribution for costs. Upon that point, *Carter* v. *Pearce* (*a*) is quite decisive, for there it was held, that a co-obligor in a bond to the ordinary, under 22 & 23 *Car.* 2. c. 10, was a competent witness to prove a tender

(*a*) 1 T. R. 163.

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by the administratrix. As to the rent, *Thomas* indeed might appear a co-lessee of the defendant, but not so with reference to *James*, and therefore he had no interest whatever in the suit; but even if he had been a co-lessee, his liability could only have extended to the rent, and not to the costs, because the costs were occasioned by the wrongful act of *James*, in replevying the goods, and therefore as to them *Thomas* had no interest, so as to render him incompetent. This witness ought to have been examined at least on the voir dire, and even upon that ground there ought to be a new trial.

Best, J.—In order to disqualify a witness on the ground of interest, there must appear a direct and necessary interest affecting him, which a party to the record would certainly have. No such interest affects this witness, who seems to have been rejected from an erroneous supposition that he was a party to the record. He is clearly not liable to the costs of the suit, but it is said he is liable to the rent, as a co-lessee with his brother. There was no direct evidence to prove him a co-lessee; the presumption was rather the contrary way; and at least he should have been in-interrogated as to the fact on the voir dire. The exclusion of evidence, without even an examination on the voir dire, has never yet been carried beyond a witness who appears to be a party to the record, which is not the case here. It is the province of the Jury, upon the facts which come out on the evidence, to judge of the credibility of the witness produced. The nisi prius case of *Goodacre* v. *Breame*, is certainly in some degree opposed to this principle. That case was decided by Lord *Kenyon*, a Judge for whom I entertain the most profound respect; but if that case were not distinguishable from this, which it certainly is, I should hesitate before I acted upon it as an established principle. I am therefore of opinion that this evidence was improperly excluded, and that the rule for a new trial ought to be made absolute.

Rule absolute.

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COLLINS and Others *v.* PROSSER and Others, Executors of G. S. WEGG, Esq. deceased.

A surety bond by three, for the payment of 1000*l.* worded, "for which payment to be well and faithfully made, we bind ourselves and *each* of us for himself, for the whole and entire sum of 1000*l.* *each*," is a several and not a joint and several bond, and may be enforced against the obligors severally.

Tearing off the seal of one of the obligors of such a bond does not avoid it as against the others, and if the obligor against whom it is enforced, is entitled to contribution, it seems his remedy is in equity only.

DEBT on bond, executed by the defendant's testator, in his life-time, for 1000*l.* as surety for *George Boulton Mainwaring*, Esq. Defendants craved oyer, and set out the bond, by which, first, *G. B. Mainwaring* held himself, his heirs, &c. bound in the sum of 12,000*l.* to be paid to the plaintiffs, Justices of the Peace for the county of *Middlesex*, their attorney, executor, and administrators; by which, second, *E. Wodehouse*, Esq. bound himself to pay to the plaintiffs the sum of 3000*l.*; and by which, third, *P. Presland*, *Samuel Jackson*, and *William Everett*, Esqrs. bound themselves and each for himself, and the heirs, &c. of each, to pay the sum of 2000*l.* each to the plaintiffs. The bond then proceeded in the following terms:—"And be it also further known unto all men by these presents, that we Sir *Nathaniel Conant*, of, &c. Knt., *George Samuel Wegg*, of, &c. Esq. and *John Weyland*, jun. of, &c. Esq. are also held and firmly bound to the said Justices in 1000*l.* each, of like lawful money, to be paid to the said Justices, or, &c. for which payment to be well and faithfully made, we bind ourselves and each of us for himself, for the whole and entire sum of 1000*l.* each, and the heirs, &c. of us and each of us firmly by these presents, sealed with our seals, dated 1st *December*, 1814." In executing the bond, only one of the parties had set the sum for which he became bound, opposite his name and seal. Defendants then craved oyer of the condition of the bond, which recited, that the Justices of the Peace for the county of *Middlesex*, at the General Quarter Sessions held, by adjournment, for the said county, on the 5th *July*, 1804, had elected and appointed *G. B. Mainwaring*, Esq. treasurer and receiver of the county rates and other monies assessed by virtue of certain acts of parliament therein mentioned, and that by reason of the great increase in the expenditure of the county, the average ba-

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lances remaining in the hands of the said *G. B. M.* were necessarily greatly increased, and the said *G. B. M.* as such treasurer, having on the day of the date of the bond, exhibited an account of receipts and expenditures on account of the county, and it appearing on the face of the said account, that there was a balance of 9177*l.* due from him to the county, and it being thought proper by the Court, that an adequate security should be given to the county to the amount in the whole of 12,000*l.* and the obligors in this bond having proposed and agreed to become security for the several sums set to their names respectively, and not further or otherwise, the condition of the obligation was, "that if the said *G. B. M.* his heirs, &c. did and should well and truly pay, or cause to be paid, all and every such sum and sums of money as should remain in his hands, or be received by him, and for which he had not duly accounted as treasurer as aforesaid, &c. then the said obligation to be void; but if default should be made in any of the premises above mentioned, then to be and remain in full force and virtue." Defendants then pleaded, first, that the bond was not the deed of the testator; second, that after the making of the bond, to wit, on 1st *January*, 1816, the seal of Sir *N. Conant* was torn and taken away from the bond, without the privity or consent of the testator, or of defendants as executors, whereby it became void as to the testator, and defendants as executors, concluding to the Court; and third, that the seal of the said Sir *N. Conant* was torn off and taken away from the bond on the same day and year, with the privity and consent of the plaintiffs, whereby the bond became void as to the testator and defendants as executors, concluding to the country. Replications, similiter to the general issue; and as to the other pleas, that before the seal of Sir *N. Conant* was torn off and taken away from the bond, to wit, on 22d *May*, 1820, *Francis Const* agreed to become, and did become, surety for the said *G. B. Mainwaring* in the room of Sir *N. Conant* in the said sum of 1000*l.* wherein the said Sir *N. C.* was so bound as aforesaid, and thereupon

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the said *F. C.* by his bond, bearing date the day and year aforesaid, became bound to the plaintiffs in the penal sum of 1000*l.* the condition of which bond was in all things the same as the condition of the bond in the declaration mentioned, and thereupon the seal of Sir *N. C.* was torn off and taken away from the bond, in the declaration mentioned, as alleged by defendants; that on the 12th *June*, 1822, being before the commencement of this suit, *Francis Const* paid to the plaintiffs the sum of 1000*l.* in which he was so bound, and thereupon the bond was delivered up to him, concluding to the Court. General demurrer to the replication to the second and third pleas, and joinder in demurrer.

*Littledale* in support of the demurrer, contended, first, that the bond being joint and several, a separate action against Mr. *Wegg's* executors would not lie; second, that tearing off the seal of Sir *N. Conant*, cancelled the bond altogether; and third, that the substitution of another obligor in his stead, and payment by that obligor made no difference. First, this is clearly a joint and several bond, as appears from its terms, which are, "we bind *ourselves* and each of us for himself, for the whole and entire sum of 1000*l.* each, &c." The word "ourselves" shews it to be a joint obligation, more particularly when followed by the words "each of us." The word "each," it will be contended on the other side, renders the obligation several and individual, but it has no such effect. That word was introduced merely for the purpose of shewing that no more than the 1000*l.* there mentioned, was to be secured by the bond; it was added merely for the sake of greater certainty and precision, and of shewing, that if any one of the obligors should be called upon for the whole penalty, he would have a claim upon the others for a contribution respectively. Had it been the intention of the parties to enter into a several obligation, the pronoun "I" would have been used, and not "We." Upon the face of the bond, the obligees have their election, in case of non-payment, to sue all the obligors jointly, or any of them severally. Suppose the case of a

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chattel in the joint possession of three persons; a creditor of the three might sue out one joint execution against all, and under it might sell the whole; but if it were in the several possession of one, he could sell only one third under one execution. So, in the present case, one action against any one of the obligors would be the proper course for the obligees to adopt, and would save much expence to all parties. The bond is to be construed most strongly for the obligees against the obligors, and the result is, that it will appear a joint and several bond. *Mathewson's* case (*a*) is distinguishable from this, for there the obligors covenanted, to pay separately and individually, and they had each a distinct and separate interest. Second, the bond is void in toto, one of the seals having been torn off. For this, *Winchcomb* v. *Pigot* (*b*), where that principle is laid down by *Dodderidge*, J. citing the case of *Nicholls* v. *Haywood* (*c*), is an authority in point. The cases of *Mitchell* v. *Stockworth* (*d*), and *Seaton* v. *Henson* (*e*), citing *Mathews's* case and *Watkins's* case (*f*), are also in support of this position, which is also conformable with the principles of law applicable to releases (*g*). If, therefore, this be a joint and several bond, it is clear that it has been rendered void by the removal of one of the seals. But even if it be not joint and several, the defendant is entitled to judgment, because an alteration of a material nature has been made in the bond, without his knowledge or consent. The obligors here stand in the relation of sureties to each other, and it is important for the interest of each, that he should know who his co-sureties are. When the bond was in its original state, the defendant knew who his sureties were, but when one of them had been released without his knowledge, he was deprived of his remedy against his co-surety. The release of one is a release of all; and therefore whatever may be the nature of the bond, it is clearly avoided, and this action

(*a*) 5 Rep. 22, b. and Cro. Eliz. 408. 470. and 546.
(*b*) 2 Bulstr. 247.
(*c*) Dyer, 59, pl. 12.
(*d*) Owen, 8.
(*e*) 2 Lev. 220. S. C. 2 Show. 28.
(*f*) March. 125.
(*g*) 2 Rol. Abr. 414.

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must fail. It will be contended on the other side, that if the bond be several, one obligor having paid the principal, has no claim upon the others for contribution; but that is not so, for it was expressly held in *Deering* v. *Lord Winchelsea* (a), that where three were bound in several bonds, as sureties for a fourth, and one of them was compelled to pay the whole penalty, the other two were liable over to him for their respective third shares. A fortiori the rule will apply where several are bound in one bond, and consequently to release one of the parties is a serious injury to the rest, and cannot possibly be repaired by any subsequent act of the obligees. Upon these grounds the defendants are entitled to judgment.

*Rogers*, contrà. This is a several bond only, and the action is maintainable against the executors of Mr. *Wegg* separately. The word "each" in the very important situation in which it stands, being annexed to a sum distinct from and subordinate to the whole sum intended to be secured, shews it to be a several bond, and no more. In joint and several bonds, though the obligation on the part of the obligors be joint, yet the remedy by the obligees may be either joint or several (b). The material distinction between a joint and several, and a joint bond is, that if the bond be joint and several, the duty is joint as between the co-obligors, but if joint, the obligees' remedy may be joint or separate. In all the cases cited, there has been a joint duty to be performed, or a joint sum to be paid; and in that respect they are all distinguishable from the present. The case of *Mills* v. *Marshall* (c) is an additional authority to those already cited. That was an action on an arbitration bond, and both the obligors had one joint duty to perform, whereas here it is plain, from the language of the instrument, that each has a separate duty. The word "each" in this case, is as powerful in its operation as the word "separatim" was held to be in *Mathewson's* case (d). The language of the recital here, which is clearly several, must be taken as influencing and

(a) 2 Bos. & Pul. 270.

(b) Sheppard's Touchstone, 375.

(c) Bridgman, 63.

(d) 5 Rep. 22, b.

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affecting that of the condition. *Pearsall* v. *Summersett* (a), and *Liverpool Water Works Company* v. *Atkinson* (b). The obligation of the parties must be confined to that sum which is set against their names, and cannot be extended to the larger sum which is mentioned in another part of the bond, unconnected with them; *Payler* v. *Homersham* (c). In order properly to decide whether a bond be joint or several, the subject-matter must be considered, and the whole must be taken and viewed together; *Hungate's* case (d), and *Linn* v. *Crosling* (e). In a case in *Dyer* (f), a bond, worded "obligamus nos, et utrumque nostrum per se, pro toto et in solido," was said to be joint; but that is quite a different obligation from the present; for here there is no joint payment to be made, and no joint duty to be performed. There may be several contracts in the same instrument, but the introduction of words of plurality does not vary the case; because, if the obligors are bound severally, they are severally liable. *Constable* v. *Clobery* (g), *Linn* v. *Crosling* (h), *Bayley* v. *Garford* (i), and *Seaton* v. *Henson* (k). Then the removal of the seal does not alter the defendant's liability, for if the obligors are bound severally, the release of one does not release the rest. *Bull. N. P.* 172; and 2 *Rol. Abr.* 30, citing *Mathewson's* case (l). With respect to the argument upon the subject of contribution, that is a point which cannot properly arise upon the present occasion. The only case cited upon that point is in equity; *Deering* v. *Lord Winchelsea*; and the whole question is one rather for the consideration of a Court of Equity than of Law. In the case of *Cowell* v. *Edwards* (m), Lord *Eldon* expressed considerable doubt whether an action at law would lie for contribution in a complicated case, because the parties might still be driven to Equity. But the situation of these parties differs materially

(a) 4 Taunt. 593.
(b) 6 East, 507.
(c) 4 M. & S. 423.
(d) 5 Rep. 103, a.
(e) 2 Rol. Abr. 148.
(f) Dyer, 19. pl. 114.
(g) Poph. 161.
(h) 2 Rol. Abr. 148.
(i) March. 125.
(k) 2 Lev. 22. S. C. 2 Show. 28.
(l) 5 Rep. 22 b.
(m) 2 Bos. & Pul. 268.

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from that of the parties in that case; and even if Sir *Nathaniel Conant* is released for himself, still he would not be released with reference to his co-sureties; they would still have a claim upon him for contribution, and the bond might be given in evidence to support it. He cited *Master* v. *Miller* (a), *Argoll* v. *Cheney* (b), and *Skip* v. *Huey* (c). Whatever money has already been paid upon the bond, is a fund for the benefit of the whole of the obligors. *Ex parte Gifford* (d).

*Littledale*, in reply. The general argument respecting the influence of the recital over the condition of the bond, must be admitted; but it does not vary the present case. Here every one of the obligors is a surety for one and the same duty, that is, for the good conduct of Mr. *Mainwaring*, and any default by him is to have the effect of binding them all in the full penalty of the bond. They have therefore collectively the same joint interest, and are consequently under a joint obligation. For this, *Slingsby's case* (e), *Anderson* v. *Martindale* (f), and *Southcote* v. *Hoare* (g), are authorities. The removal of the seal completely destroys the bond, and it is doubtful whether it could be proved, if its existence were put in issue.

BAYLEY, J.—Whenever parties enter into a joint and several bond for the payment of one entire sum, whatever act discharges any one may discharge them all; but I think no such consequence follows in this case. In the first place, I am perfectly satisfied this is not a joint and several, but a several bond only; and it would be working the greatest possible injustice to give the obligees the option of saying that it was joint and several. It is quite plain from the recital, and from the whole object of the bond, that such was not the intention of any of the parties. The recital shews that Mr. *Mainwaring* was required to give security to a

(a) 4 T. R. 320.
(b) Palmer, 403.
(c) 3 Atk. 91.
(d) 6 Ves. 805.
(e) 5 Rep. 18 b.
(f) 1 East, 497.
(g) 3 Taunt. 87.

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considerable amount, and that different persons were willing each to give security to a certain extent, and the sums for which they agreed to become security were to be set opposite their respective names. When they came to execute the bond, however, one individual only set the sum opposite his name, and that act shews very clearly (if it were necessary so to do) what was the intention of the parties. Mr. *Wegg*, Sir *Nathaniel Conant*, and Mr. *Weyland* became bound for 1000*l*. each, in these terms:—"for which payment we bind ourselves and each of us for himself, for the whole and entire sum of 1000*l*. *each*." By that obligation, they might be separately and severally sued upon the bond for 1000*l*. The word "each" has the effect of binding the parties separately, but not jointly. Construing the bond in that view, which is the true meaning of it, then the question is, whether removing the seal of Sir *Nathaniel Conant* has the effect of cancelling the bond as to all the obligors; for to that extent the argument for the defendants must be carried. I am clearly of opinion that it has not that effect, and if it had, it would come to this, that where there are many different persons willing to join in a surety bond, some for large sums and others for small, the cancellation of it as to one obligor, no matter how small the sum may be, would render the bond void in toto, and thereby release persons who had perhaps bound themselves to pay several thousand pounds. If we were to hold that to be law, it would be working very great injustice, and acting upon a technical rule, to a most improper extent. It is pressed upon us, that the removal of Sir *Nathaniel Conant*'s seal, takes from Mr. *Wegg* and the other parties the power of calling upon him for contribution. If we could find any legal authority to that effect, we should be bound by it, but no authority being cited, we must exercise our own common sense, and act upon the principles of common honesty, which clearly are against the argument for the defendants. Whether Mr. *Wegg*'s executors would have any remedy against Sir *Nathaniel Conant*, for contribution, is not properly a question for our consideration. If

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they have sustained any prejudice by the removal of Sir *Nathaniel Conant*'s seal, they may obtain relief in equity; but I am of opinion that this being a several bond, that act does not avoid the bond, nor afford any answer at law to the present action.

HOLROYD, J.—I am of opinion that this cannot be considered as a joint and several bond. The word "each" following the words "one thousand pounds," is decisive to shew, that the several obligors named in that part of the bond, are respectively bound to pay that entire sum. The words "we bind ourselves and each of us for himself," would alone make it a several and not a joint bond. I am also of opinion that the removal of Sir *Nathaniel Conant*'s seal has not the effect of avoiding it as to the other parties, because they are severally bound, and each is liable upon his own obligation. Whatever relief Mr. *Wegg*'s executors may be entitled to, in the way of contribution, must be sought in a Court of Equity; but according to the case of *Cowell* v. *Edwards*, they would be only entitled to an aliquot proportion of the money paid by their testator, regard being had to the number of his co-sureties. Mr. *Wegg*, however, being separately liable upon this bond, the cancellation of it with respect to Sir *Nathaniel Conant*, affords no answer in a Court of Law.

BEST, J.—It is insisted, first, that this is a joint and several bond, and second, that all the other obligors are discharged by the removal of Sir *Nathaniel Conant*'s seal. Unless the first proposition is made out, the second can have no effect in a Court of Law. If authorities were necessary upon this point, *Mathewson*'s case, *Bull. N. P.* 172, and *Roll. Abr.* 30, are decisive to shew, that taking off one of the seals of a several bond, does not destroy it, quoad other obligors in a Court of Law; and no case is cited impugning the authority of these decisions. But it is insisted, that notwithstanding this, the defendants would be entitled to contribution in a Court of Law. The doctrine of con-

tribution is new in Courts of Law. *Gould*, J. once said, that in the early part of his life, it was never heard of. But admitting that the Courts have in modern times entertained this doctrine, it may be questionable whether in this case the defendants would have any remedy for contribution in a Court of Law; for in *Cowell* v. *Edwards*, Lord *Eldon* doubted whether, in complicated cases, an action for contribution could be maintained. That doubt is not only entitled to attention from the great learning of the person who expressed it, but because questions of this nature are more properly within the province of a Court of Equity, where the Judge is unfettered by the distinctions of the common law, and may afford relief to all parties, without their having recourse to actions against each other. Notwithstanding the judgment of *Eyre*, C. B. in *Deering* v. *Earl Winchelsea*, in which he refers to common law authorities, I think in such a case as this, the defendant's remedy, if any where, is in a Court of Equity, and not at common law. The point for our decision comes back to the question whether this is a joint or several obligation. I am of opinion that it is several only. If it were joint, the removal of the seal would undoubtedly avoid it altogether; but we are to look at the instrument itself, and see whether it bears the construction attempted to be put upon it. If *Slingsby's* case, which has been relied on for the defendants, be law, it does not apply here. This bond begins, continues, and ends with individual and several expressions; the word "each" runs through it; "for which payment to be well and faithfully made, we bind ourselves and *each* of us for himself." What payment? A payment of 1000*l*. *each*; the words are, "for the whole and entire sum of 1000*l*. *each*." The bond is worded with an evident intention to apply severally. It must be taken reddendo singula singulis, and we cannot but construe it according to the letter and spirit, as a separate obligation.

Judgment for the plaintiff.

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THE like judgment was given against this defendant upon the same bond.

### William Dawes v. Edward Benn and Henry Whitfield Creswell.

Seed tares are a great or rector's tithe, and pass to the impropriator, under a grant of "decimas garbarum et granorum," when coupled with evidence of perception.

THIS was an issue directed by his Honor the Master of the Rolls, to try whether the plaintiff was entitled to the tithe of seed tares, growing, arising, and renewing, and which were had and taken by the defendant *Edward Benn*, on and from the lands in his occupation, situate in the hamlet of *Hatton*, in the parish of *Bedfont*, in the county of *Middlesex*, in the several years 1813 and 1814. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after *Hilary* Term, 1822, a verdict was found for the plaintiff, in the affirmative of the words of the issue, with nominal damages, subject to the opinion of the Court on the following case:—The parish of *East Bedfont*, in the county of *Middlesex*, consists of two rectories, the one called the rectory of *East Bedfont*, the other called the rectory of *Hatton*. By letters patent, dated 14th *September*, in the 41st *Elizabeth*, the said Queen granted in fee to *Henry Best* and *Robert Holland*, among other things, "Necnon omnes illas decimas nostras garbarum et granorum annuatim et de tempore in tempus crescentium, provenientium, seu renovantium in *Hatton*, infra parochiam de *Bedfount* in prædicto comitatu *Middlesex*, habendum, tenendum, et gaudendum, præfatis *Henrico Best* et *Roberto Holland* et hæredibus et assignatis suis." The property in the said tithes has descended to, and is now vested in the present lay impropriators thereof, and the plaintiff, during the time in question, was lessee under them, of all and every the tithes of corn and grain, and all other rectorial or great tithes whatsoever, yearly and from time to time coming, growing, arising, happening, re-

newing, increasing, or to come, &c. in, upon, or out of all those lands and grounds within the said hamlet of *Hatton*. The defendant *Edward Benn* became the occupier of a farm within the said hamlet and rectory of *Hatton*, at the latter end of 1811, and continued to occupy it during the years 1812, 1813, and 1814; and the defendant *Henry Whitfield Cresswell* is the executor of the late Dr. *Whitfield*, who, during those years and many years preceding, was the vicar of the said parish of *East Bedfont*. As far back as living memory extends, tares have been grown in the hamlet and rectory of *Hatton*, and upon the farm occupied by the defendant *Edward Benn*. If cut green, the tithe was rendered or compounded for to the vicar; if suffered to stand till ripe, the tithe was yielded or compounded for to the lay impropriator or his lessee, from time to time, and the defendant *Benn*, in the year 1812, rendered the tithe of seed tares to the plaintiff, but in the year in question, he refused to render such tithe, upon the ground that the same was a small tithe, and therefore payable to the vicar. Three witnesses were examined, who proved this usage; one of them was of the age of eighty-six, and another of fifty-six, and both these persons said, that seed tares were considered as great or rector's tithe; the third, who was the plaintiff's son, and who had actually received the tithe of the defendant *Benn*, as before mentioned, said they claimed them as a great tithe. Tares, when once cut, do not spring up again like clover; if cut green, they are given as fodder to cattle; if suffered to stand till ripe, they are then cut and laid in wads unbound, like beans and peas, and are carried home and threshed in the barn like barley, oats, peas and beans. After threshing, the stalks are used for foddering cattle, like the straw of oats, and the seed usually given as food to pigs and pigeons. Tares thus harvested, are called seed tares. The stalks of rape, if suffered to stand till ripe, are commonly burnt as useless. No endowment of the vicarage was proved. It appeared in evidence, that the vicar had enjoyed the tithe of hay, and was considered to be entitled thereto. The vicar had always received, and was

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admitted to be entitled to all the small tithes, with the exception of the tithe of seed tares, if the Court should be of opinion that such tithe is a small; tithe the right to the tithe of such tares being the question for the consideration of the Court under all the circumstances of the case. If the Court should be of opinion that the plaintiff is entitled, the verdict is to stand. If the Court should be of the contrary opinion, a verdict is to be entered for the defendants.

*Wilde*, for the plaintiff. This case is to be discussed as a question between rector and vicar. It is clearly established, that a rector is primâ facie entitled to the whole tithes of the parish, and the vicar can claim nothing, unless he shews an endowment, or some evidence from which an endowment may be inferred. *Grene* v. *Austen* (*a*), *Sims* v. *Bennett* (*b*), *Garnons* v. *Barnard* (*c*), *Awdry* v. *Smallcombe* (*d*), and *Kennicott* v. *Watson* (*e*). In *Lord Dartmouth* v. *Roberts* (*f*), it is laid down, that modern enjoyment is the best interpreter of right in the absence of documents. Therefore even if this were a small tithe, custom would carry it in favor of the impropriator; and, if large, à fortiori he would be entitled to keep it. Here there is no endowment to the vicar; the perception is also against him; for he not only has not received the tithe, but the evidence is, that it has been received by the impropriator. As the defendant has made out no title in the vicar, the next question is, whether the plaintiff is entitled to claim on behalf of the rector, or as if he were in the place of the rector. Are the words of the grant large enough to carry all that the crown possessed? The words are "decimas garbarum et granorum." What the meaning of "garbæ et granæ" is, must be collected from various authorities.

(*a*) 1 Gwil. 226. S. C. Yelv. 86.
(*b*) 3 Gwil. 887.
(*c*) 4 Id. 1468.
(*d*) 4 Id. 1528.
(*e*) 2 Price, 250 & 260, n. See 2 Price, 231 & 281. 4 Wood. 268. Anstr. 313. 2 Gwil. 514 & 675. 3 Id. 1169. 1244 & 1258. Cro. Eliz. 633. 4 Gwil. 1573. 2 Buls. 27.
(*f*) 16 East, 329.

In *Toller*, p. 54, "garba," it is said, "means grain or fruits of the earth bound up in sheaves." In *Barsdale* v. *Smith* (a), *Oglander* v. *Lord Pomfret* (b), and *Smith* v. *Hodgson* (c), it was determined that "garba" would comprehend the tithe of hay or otherwise. In *Wall* v. *Fullwood* (d), it was deemed grain. In *Terms de la Ley*, "garbe" signifies a bundle or sheaf; in *Tomlin's Jacob's Law Dictionary*, "a bundle or sheaf of corn, and in some places it is taken for a handful." *Cowel's Interpreter* gives the like definition. In *Sims* v. *Bennett* (e), it carried peas and beans; Lord Keeper *Henly* holding that "garba" means "quod ligari potest;" and, from analogy, tares may also pass under it, because they are capable of being bound. The usage proved in this case is conformable to this construction. Then, if it is clear that the crown intended to grant all that it possessed, the question is, whether the grantee of the crown has demised to the plaintiff all that he possessed. The demise is of "all and every the tithes of corn and grain, and all other rectorial or great tithes whatsoever." By these words, it is manifest that he intended to grant all that he possessed. Could he claim the tithe of tares in opposition to the plaintiff? Certainly not; and the defendant *Benn* has adopted this construction by former payments. In this view of the case it is immaterial whether tares be great or small tithe; for even if they were small, the word "garbæ" would carry it, especially when coupled with usage. But it is a great tithe, first, from its nature, and second, from authority. In the first place, it resembles corn or grain in its nature; the stalk is useful, and the plant is perennial. Then, on authority, Lord *Coke* (f), in his division of great tithes and small, enumerates, amongst the former, "zizania," which clearly means tares. In *Perry* v. *Soam* (g) it is selected as an example; and tares are spoken of as being known time out of mind.

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(a) Cro. Eliz. 633. 1 Gwil. 207.
(b) 3 Gwil. 1244.
(c) 2 Wood. 21.
(d) 1 Com. 330.
(e) 3 Gwil. 887.
(f) 2 Inst. 649.
(g) Cro. Eliz. 139.

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From these it appears, therefore, that tares are great tithes, first, from their nature; second, from authority; and third, from custom, which last is decisive in all cases, except in one peculiar class, namely, where the article is of novel introduction. Here the article is clearly not novel. It will be said on the other side, that the custom in this case cannot prevail, because it is founded in a mistake, in consequence of a supposed analogy between tares and other grain; but the mistake of analogy has never been applied to the judgment of a Court of Justice, and can have reference only to the opinion of the parishioners themselves. But if this were otherwise, the argument from analogy would not favor the defendants. Peas and beans are a great tithe according to *Gumley* v. *Burt* (a); and peas, beans, and tares, are all of the same family. Tares are not analogous to hay, because that is an exception. They have no analogy to seed, because they partake of the nature of corn, and all the decisions are against this analogy. *Nicholas* v. *Austen* (b), *Nicholas* v. *Elliott* (c), and *Gumley* v. *Burt*. On these grounds the plaintiff is entitled to judgment.

C. *Creswell*, contrà, argued, first, that, admitting the rector to be entitled primâ facie to all tithes, and that this was to be treated as a question between rector and vicar, still neither the words of the grant, nor of the lease, would carry the tithe of tares to the plaintiff; second, that the evidence of usage, connected with those instruments, was not sufficient; and, third, that from analogy to other seed, the seed of tares was a small tithe, and went to the vicar. Agreeing that the rector, on the one hand, is primâ facie entitled to all the tithes, yet it must be conceded, on the other, that the vicar is in this case endowed of all small tithes, and if this is a small tithe, it is clear he would be entitled to it. The words "garbarum et granorum" do not necessarily include the tithe of tares, because, unless seed tares can in strictness be called grain to distinguish them

(a) 2 Wood. 231. S. C. Bunb. 169.
(b) 2 Wood. 10.
(c) 1 Wood. 523.

from seeds, in the ordinary sense of the word, they cannot be called a great tithe. As seed, without any qualification, they would clearly go to the vicar as a small tithe. The description here is "seed tares," which imports seed in its ordinary sense; and therefore under the words "garbarum et granorum," they cannot pass to the impropriator. The payment of this as tithe to the rector has arisen from an erroneous notion that the seeds of tares are great tithe, without regard to the distinction between grain and seed. If, therefore, it can be shewn that the seed of tares form a middle class between grain and seed, then it will follow that the plaintiff cannot be entitled to the tithe either under the grant, the lease, or the usage. The case of *Southcott* v. *Southcott* (*a*) is an authority to shew that by common intendment the words "garbarum et granorum" will not pass any thing but corn. There it was said by *Roll*, J., that the words "seminavit cum grano," by common construction, shall be meant "with corn, and not with seeds." This is an authority to shew that the word "grain" is limited to corn, and upon that principle tares cannot be included in the word "grain." In *Dorman* v. *Curry* (*b*), *Richards*, C. B. observes, "It is true that it was long very doubtful whether seeds were a great or a small tithe, or belonged to the rector or vicar, but there have been many cases since, wherein it has been clearly held, that proof of payment of tithes of seeds to the rector shall not affect the right of the vicar, and the reason is, that the prevailing erroneous notion of seeds being a great tithe destroys the usual effect of the evidence of its perception as such by a rector." The stats. 31 *Geo.* 3. c. 30. s. 15. 41 *Geo.* 3. c. 1. 42 *Geo.* 3. c. 35. 49 *Geo.* 3. c. 98. 55 *Geo.* 3. c. 26. 58 *Geo.* 3. c. 82. relating to the exportation and importation of corn, may be taken as legislative expositions of the word "grain," and yet in the various articles there enumerated, as falling within that definition, tares are not to be found. The use to which this article is applied, is no criterion as to the class to which it is to be assigned; for in *Wallis* v. *Pain* the clover seed was given

(*a*) Styles, 108.

(*b*) 4 Price, 115.

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to feed pigs, and yet it was held a vicarial tithe. Therefore the circumstance of the seed tares being given to feed pigs and pigeons in this case, cannot be prayed in aid of the argument on the other side. If tares are to be considered great tithes, because of their application to the feeding of farming stock, upon the same principle rape seed, canary seed, and several other seeds which are given to cattle, might be considered a great tithe. Vetches cut green, in one of the cases cited, were held a vicarial tithe, and there seems no sound reason why the seeds when ripe shall not fall under the class of seeds. If the payment of the tithe to the rector or the vicar is to be regulated by the nature of the seed, and not by the stalk of the plant, then this seed resembles those which are declared to be small tithes. The question then is, whether the evidence of usage in this case is sufficient, when coupled with the grant and the lease, to carry them under the words "garbarum et granorum," as a great or rector's tithe. Evidence of usage in these cases must be consistent, clear, and decisive. It is not to be left to the opinion of the parties either paying or receiving, nor to any vague reputation which may have obtained in the parish. In this case the witnesses merely give their own opinion of the character of the tithe, without any sound basis to justify their statement, and they profess to speak in terms which import a degree of knowledge upon the subject, which they could not by possibility possess; for they do not confine their evidence merely to the usage of their own parish, but they profess to treat it as an usage prevailing throughout the kingdom. Upon such evidence as this the Court cannot act on a question of this nature, and therefore the supposed usage must be left altogether out of consideration. In an action tried between these same parties in the *Common Pleas*, before *Gibbs*, C. J. in 1814, in which the plaintiff tendered evidence merely of usage in opposition to certain admissions in the case, the Lord Chief Justice thought that such evidence was not admissible, and said he must take it that the seeds tares were merely preserved for seeds, and therefore that they were to be con-

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sidered small tithes. In consequence of this intimation, the plaintiff elected to be nonsuited, and never afterwards attempted to disturb that opinion. The present Master of the Rolls (Sir *Thomas Plumer*) when he directed this issue, observed, that "the only direct authority on the point is the opinion of Lord Chief Justice *Gibbs*; upon that authority, and on general principles, I am very clear that the plaintiff has nothing in support of his case but usage." This seems to have been a confident opinion upon a matter of which there seemed to be no doubt in his Honor's mind. In the third place, upon the ground of analogy to other seeds, the plaintiff cannot claim this as a great tithe. There is no doubt that the seeds of tares resemble "seed," popularly so called, more than grain; but if even they form a middle class, and fall within the denomination of "seed," they clearly would not pass to the plaintiff. The mode of treating the article, as stated in the case, shews that it resembles seed more than grain. The passage cited from 2d *Inst.* by no means bears out the argument for which it was cited, because it is manifest that Lord *Coke* is not there speaking with reference either to the rector or vicar's claim to tithes. He uses the word "zizania" merely as a general term, applicable to tares in any state, whether cut green or ripe and therefore the word is not to be taken in the sense contended for, because tares cut green have been held a small tithe. Then it is clear from all the decisions, that tares do not come within the word "garba." It is assumed on the other side, that because they have the capacity of being bound up, or garbed, that therefore they will pass by the word "garba," but that is not sufficient. In all the authorities, whether definitions or decided cases, the word "garba" is referrible entirely to grain, properly so called, and not to seed, which may by possibility be garbed. In *Rees*'s Encyclopædia, garbe means "a sheaf of any kind of grain." This is the construction put upon the word in *Southcott* v. *Southcott* (*a*), *Fairfax* v. *Fairfax* (*b*),

(*a*) Styles, 108.

(*b*) Idem, 256.

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and in *Pigot* v. *Hearn* (a). In *Cowell's* Interpreter, "garbe," it is said, cometh of the *French* word "*garbe*," otherwise *gerb*, i. e. *fascis*, which signifies, "a bundle or sheaf of corn;" and *Charta de Foresta*, c. 7. is cited. In the case of *Sims* v. *Bennett* (b), where the passage from *Lindwood's* Commentaries, 188, is cited, "Erroris damnabilis devio exæcati suarum animarum exidia non devitant, dum frugum suarum decimam garbam solventes pro labore metentibus, eâ minimè computatâ, non absque errore calculi, pro decimâ undecimam solvunt garbam, &c.;" it is obvious, as was there contended, that the word "garba," in this passage, must be applied to "fruges;" and therefore *Lindwood*, as far as his authority goes, carries the case no farther. He referred to *Barsdale* v. *Smith* (c); and in conclusion insisted, that this article being in its nature seed, and resembling other seeds, and having none of the properties of grain, it must be treated as a small tithe, and therefore as going to the vicar under his endowment of all small tithes.

*Wilde*, in reply, urged, first, that the grant of the crown had conveyed to the grantee all that the crown possessed, and the lease to the plaintiff having demised all that the lessor was entitled to under the grant, there could be no doubt that the plaintiff was entitled to this as a great tithe, provided it had all the properties of a great tithe; and, second, that upon the authorities already cited, and particularly *Wallis* v. *Pain* (d), and *Sims* v. *Bennett* (e), this article being a leguminous plant, and having the quality "quod ligari potest," it ranged itself at least under the head of a great tithe, if not under the words "decimas garbarum et granorum." The opinions of *Gibbs*, C. J., and the Master of the Rolls, could not govern this case. The first was a mere dictum at nisi prius, and not founded on any mature deliberation; and as to the other, it could have no weight, because it was quite clear that the Master of the Rolls

(a) Cro. Eliz. 599.
(b) 3 Gwil. 883.
(c) Cro. Eliz. 633.
(d) 2 Com. Rep. 633.
(e) 3 Gwil. 887.

desired the opinion of this Court on the whole question, or he would not have directed the issue. The statutes referred to were passed alio intuito, and not at all with a view to a legislative exposition of the words "corn or grain." 1823. DAWES v. BENN.

BAYLEY, J.—If in this case the vicar were endowed of all small tithes, and if it were clear that tithe of tares, when they stand for seed, is a small tithe, there would be nothing upon which we should have to deliberate; but when we look to all the facts, and the usage, which is stated as a part of the case, it appears to me, upon the best consideration I am able to give the subject, and upon all the authorities which have been cited, that this is a tithe to which the plaintiff is entitled. The plaintiff is lessee of a person who claims under a charter granted in 41 *Eliz.* in the words "necnon omnes illas decimas nostras garbarum et granorum, annuatim et de tempore in tempus crescentium, provenientium, seu renovantium, in *Hatton*, infra parochiam de *Bedfount*, &c." Persons claiming under this grant, have leased to the plaintiff "all and every the tithes of corn and grain, and all other rectorial or great tithes whatsoever, yearly arising and renewing upon all the lands within the hamlet of *Hatton*." Great part of the argument turns upon the effect to be given to the grant, and the lease respectively. It is clear that the plaintiff can take no more than what is given by these instruments; but unless the grant conveys to the grantee every thing which had been vested in the crown, this singularity would arise, namely, that there would be three different proprietors of tithes in the parish, first, the vicar, entitled to his proportion of that with which he had been originally endowed; second, the impropriator, to so much of the right of the crown as the charter passed; and third, the crown itself, to the difference between what had been remaining in the abbey or monastery, and that which was passed by the grant. But that would be so extraordinary a position, that I cannot suppose the crown, when it used the words "garbarum et granorum,"

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intended to pass less than the whole interest which it then had, whatever might have been the terms in which the rectory was originally endowed. I am therefore of opinion that we are to construe the charter of *Elizabeth* under the terms "garbarum et granorum," (when connected with the usage in the case), to apply to the tithe in question, provided it was then in the possession of the crown, and consequently, the grantee is to be considered as standing in loco of the crown, with exactly the same rights as an ordinary rector would have. For this reason, this is to be considered entirely as a question between vicar and rector, unless the lease from the persons who claim under the charter to the present plaintiff, demises a part only of their rights, and not the whole. The terms of the lease are "the tithes of corn and grain, and all other rectorial or great tithes whatsoever." If this be grain, cadit quæstio, because there are words sufficient to pass it. If it be not grain, then it becomes a question of rectorial or great tithe, according to the sense which ought to be put upon the words used in the lease. When I find the words "rectorial or great tithe," and that the party who grants the lease has in his possession all the tithes that are attached to the rectory, I consider the term "rectorial," as meaning all the tithes belonging to the rectory in question. Now upon a question between rector and vicar, usage is of decisive importance, and unless there is something plainly shewing that the usage is illegal, we ought to act upon it in this as in any other class of cases. The case states, "That as far back as living memory extends, tares have been grown in the hamlet and rectory of *Hutton*, and upon the farm occupied by the defendant. If cut green, the tithe was rendered or compounded for to the vicar." Why should it be rendered and compounded for to the vicar, but because when cut green, it is given to the cattle, and then it stands in the place of agistment tithe, and may have gone to the vicar, on the ground of his having been endowed of all agistment tithes. "If suffered to stand till ripe, the tithe was yielded or compounded for to the lay impropriator

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or his lessee from time to time." But, it is contended for the defendant, that although as far as usage has ever gone, the tithe has been paid to the lay impropriator or his lessee, yet the evidence shews that the practice has originated in a mistake, which ought now to be rectified. The foundation of this argument is, that three of the witnesses to the usage have dropped particular expressions which were not evidence. The case states, that "three witnesses were examined, who proved this usage; one of them was of the age of eighty-six, and the other of fifty-six; and both these persons said *that seed tares were considered a great or rector's tithe.*" If they meant to say that it was considered a great or rector's tithe *throughout the whole kingdom,* they would probably be giving evidence upon a point to which no evidence could by law be received, and not within the compass of their knowledge; but it is manifest, that they are only speaking of the usage in their own parish. "The third, who was the plaintiff's son, and who had actually received the tithe of the defendant, said they claimed them as a great tithe." These witnesses speak to the fact, by whom the tithes were taken; and that is the important part of their evidence. Their supposition, one way or the other, is certainly not sufficient to give it the character of either a great or small title. The important point of the case is, that for a series of years, a vicar, who ought to know, and was most likely to know, what his rights were, has acquiesced in suffering the tithe of tares to go to the rector or impropriator. The case then gives a description of the manner in which these tares are appropriated after they are cut. "Tares, when once cut, do not spring up again like clover; if cut green, they are given as fodder to cattle; if suffered to stand till ripe, they are then cut and laid in wads, unbound, like beans and peas, and are carried home and threshed in the barn like barley, oats, peas, and beans. After threshing, the stalks are used for foddering cattle, like the straw of oats, and the seed usually given as food to pigs and pigeons." The value of this article, therefore, does not consist merely

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in the seed, but the stalks are used for foddering cattle. Probably the stalks are of no great value, but are still of some; and the seeds, when used, are not applied, as many other seeds are, merely for the purpose of reproduction, but for the maintenance of some of the live stock reared upon the farm. We have no proof of the vicar's endowment, and therefore, the extent to which he was formerly endowed remains in blank. It appears, indeed, that he had enjoyed the tithe of hay, and was considered as endowed of all small tithes. When an endowment of all small tithes is produced in evidence, the Court is bound to distinguish what are great and what small tithes, and as far as either the one or the other can be classed by legal decisions, to consider the terms of the endowment in the application of that qualification, and to give to the vicar every thing that is considered small tithes, upon the principle that a grant is to be taken most strongly against the grantor. Here, however, the terms of the endowment would have gone beyond small tithes, because the vicar is endowed with the tithe of hay. But whether these be great or small tithes, the usage would be sufficient to satisfy my mind, that the vicar had not originally been endowed in any terms sufficiently large to comprehend the seed of tares. There certainly are many authorities which put the case of seed tares upon a different footing from many of those other seeds to which reference has been made in argument. Lord *Coke* (*a*), speaking of tithes, says, "quædam sunt majores, frumentum, sigilo, zizania, fænum, et quædam minores, sive minutæ, quæ proveniunt ex menthâ, anetho, oleribus, et similibus." Zizania, I apprehend, means tares. If tares are great tithe, then cadit quæstio. They are only great tithes when they are cut in a particular way. If they are cut for fodder they are not, but if for seed, then they are great tithes. If, when cut for seed, they are to be considered small, I should have expected that

(*a*) 2 Inst. 649.

Lord *Coke*, in mentioning the different seeds which were clearly to be treated as small tithes, would have enumerated the seed of zizania, in order that no mistake might arise. There is, however, no such distinction pointed out; but there is a passage in the judgment of *Comyns*, C. B. in *Wallis* v. *Pain* (*a*), which bears strongly on this case. The question there was, whether the seed of clover was to be considered a small tithe, and it was decided in the affirmative; but the Chief Baron, in noticing seeds, observes, "Perhaps there may be a proper distinction as to peas, beans, *or other pulse*," not confining it to peas and beans only, "because they had existence in former times, and appropriations were made, *de bladis et leguminibus*, to religious houses." Therefore he says, as to seeds, there may be a distinction, namely, as to peas and beans, and other pulse. They are articles which grew in former times, and were frequently appropriated to religious houses. The word "legumina," is a general term, applicable to all descriptions of pulse. Is a tare a description of pulse? No doubt it is; so are peas, beans, vetches, and lupins, and there may be others. The kidney bean is a species of pulse. It seems to me, therefore, that this is an extremely strong authority, applicable to the case in question. The same learned Judge says (*b*), that "vetches are a great tithe if mowed or cut when ripe, but if cut green for cattle, they are small tithe." Now if there are three stages according to which it is to be predicated of vetches or tares, whether they are great or small tithes, it is rather surprising that the Chief Baron should not notice them. He mentions only two,— if cut green, they are agistment tithe, but if suffered to stand and be cut when ripe, then they are great tithe. What is the subject he is then discussing? The question of *seed tithe*. Why then, if vetches saved for seed are to be considered small tithe, would it not have been natural, when the very point was under consideration, that he should have said that vetches are great tithe if cut ripe, but if cut green they

(*a*) 2 Com. Rep. 633. (*b*) Id. 640.

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are small tithe; and they are also small tithe if they are let to stand after they are ripe, for the purpose of becoming seed. I take it, that with reference to vetches, as to all other descriptions of pulse, they may belong to the vicar or rector according to the usage; and there are two cases applicable to peas and beans which are strongly in support of that position. I have mentioned the case of *Wallis* v. *Pain*, rather out of the order of time, for the purpose of pointing to the strong distinction just mentioned. At an earlier period, namely, in 1717, the case of *Nicholas* v. *Elliott* (a), was decided. In that case it was determined that the vicar might, by usage, be entitled to the tithe of peas and beans, though cultivated in larger quantities than theretofore, by a new mode of cultivation. Formerly they had been cultivated in small quantities, and the land was dug with the spade, and partly turned with the plough, and at a later period the quantities increased, and the plough husbandry was universally introduced. But the decision there was, that the usage being in favor of the vicar, he was entitled to the tithe of peas and beans, and that being the usage, it was sufficient to support it as a vicarial tithe. In about seven years afterwards, however, in *Gumley* v. *Burt* (b), there being no endowment and no usage, it was decided, that the vicar was not entitled to the tithe of peas and beans, and the vicar's bill was dismissed; and as applicable to that subject, and that particular case, *Sims* v. *Bennett* (c), is an important authority, because, unless the impropriator was there entitled, upon the principle that the word "garba" included peas and beans, he could not have succeeded. The vicar had been endowed of every thing except the tithes "garbarum et fœni et molendini adventum." In that case the decision turned upon a species of pulse, namely, peas and beans, and the case there was very carefully discussed, and "it ap-

(a) Bunb. 19. S. C. by the name of *Austen* v. *Nicholas*, 2 Bro. P. C. 33.

(b) Bunb. 160.

(c) 3 Gwil. 887.

peared from many witnesses, that for at least forty or fifty years, beans and peas had been cultivated in the fields and grounds of the parish, and that the same had been gathered and sold green; and many witnesses proved, that the tithes thereof had always been paid or compounded for to the impropriator; and no instance at all was shewn wherein such tithes were ever paid or compounded for to the vicar." If, therefore, the case of peas and beans, as a species of pulse, is analogous to the case of tares, then the evidence in that case was the same as in this, namely, that as far back as living memory could go, the tithe had been paid to the impropriator, and not the vicar; and Lord Keeper *Henley* said, that in such case the tithe would go to the rector, and not to the vicar; and in the course of his judgment he takes notice of the etymology of the word "garba." Speaking of the argument that peas and beans gathered green could not be *garba*, and therefore could not go to the rector; for that *garba* signified grain bound up in a sheaf, which beans and peas gathered green could not be; he says, "but this is a fallacy; for when the law speaks of 'garbæ' or sheaves, it speaks of the whole produce, stalks and all." He then says, "the rector is entitled at the time of committing the grain to the earth, and it would make his right strangely precarious and uncertain to put it upon the management of the owner. If that were the case, then a great tithe gathered before it comes to maturity, would be a small tithe; and yet in *Hodgson* v. *Smith* (a), tares cut, whether green or ripe, are a great tithe. Nothing breaks into these resolutions, but that the Exchequer have determined the tithe of clover seeds to be a small tithe. The reason the Exchequer made the difference between seed, and the other cases, was not grounded on reasoning, but on authority. It was because Lord *Coke* laid it down that seeds were minutæ decimæ; and the Court of Exchequer did rightly in conforming with that rule, as it was established; and therefore that case of seeds is to be considered as an exception to the general rule,

(a) Bunb. 279.

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and does not vary the rule itself. But this exception has never been carried farther than to seeds, not to grain." And it will be found, that throughout the whole of that case, the counsel and Lord *Henley* considered peas and beans as being a species of grain. Dr. *Burn*, also, in his Ecclesiastical Law (*a*), treats the subject in the same way; and one of his classes is "corn *and other grain*, as peas, beans, *tares*, vetches;" and then he goes on to another class—"hay and other like herbs and seeds, as clover, rape, woad, broom, heath, furze." So that upon a full consideration of the whole subject, he considers beans, peas, *tares*, and vetches, as standing on the same footing, and falling under the denomination of *grain*, and he places them under a class or head, distinct from hay and other like herbs. I should also mention, that after the case of *Sims* v. *Bennett* was decided by Lord *Henley*, there was an appeal to the House of Lords; but in the reasons for the appeal, the distinction which is relied upon in the present case, was never suggested, and yet it would have been very important to point out (if it could have been) a distinction between the seed of tare and the tare itself. The pea and the bean yield nothing but the seed; the tare produces something else. If there had been three distinct stages referrible to this article, I should have expected that they would have been enumerated; but that would be reasoning against the decision of Lord *Henley*, who in another part of his judgment, speaking of garba, as a technical term, says, "the word 'garba' means *quod ligari potest*, and probably peas were actually garbed when the word was introduced into the Canon Law; but since that, barley, oats, and peas are not garbed, and wheat continues to be garbed, because the straw is of value, and to preserve it unbroken; and yet barley and oats are *decimæ garbarum*, which words carry great tithes in contradistinction to vicarial tithes." Garba, in its technical signification therefore, comprehends peas and beans growing in the fields, as well as all other sorts of corn and grain. So that peas and

(*a*) Vol. iii. p. 421 and 427, 4th edit.

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beans are in their nature a great tithe. Now if the term "garba" is properly applicable to peas and beans, and if the meaning of that word is *quod ligari potest*, it may be predicated of tares that they are as capable of being bound as peas and beans. Upon these authorities, I am of opinion that considering the language of the charter and the lease, the circumstance of there being no actual endowment in this case, that from time to time the rector has constantly taken this tithe, and referring to the nature of the article itself, we are bound to say that this is a species of tithe to which the plaintiff is exclusively entitled.

HOLROYD, J.—I am of the same opinion. The plaintiff's claim is resisted on the ground, first, that these tithes do not come within the description of "decimas garbarum et granorum;" and second, assuming that they are garbarum et granorum, yet they are not included in the lease from the impropriator, because they are not corn or grain, or any other rectorial or great tithe, and consequently whether the vicar is entitled to them or not, yet the plaintiff cannot recover, because he must stand upon his own title. It seems to me, however, most clearly, that the tithe of tares passed by the letters patent of Queen *Elizabeth* under the description of "decimas garbarum et granorum," or at least of "decimas garbarum." All the reasoning of Lord *Henley* in the case of *Sims* v. *Bennett* (which was afterwards confirmed by the House of Lords), goes directly to decide that it comes within the description of tithe which may be garbed and may be comprehended within the description of "decimas garbarum." The proper construction therefore, to be put upon the grant is, to consider it as comprehending all tithes which are accustomed to be, or which are of a nature to be garbed, particularly when coupled with usage to shew the extent to which the words were intended to apply. The usage is decisive, that they come within the description of decimas garbarum, because when cut ripe for seed, the tithe has been paid to the impropriator, but when cut green, to the

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vicar. As there is no doubt therefore, that they passed to the impropriator as a great tithe, the question is, whether the plaintiff, as his lessee, be entitled to them under the words "all and every the tithes of corn and grain, and all other rectorial and great tithes whatsoever." It is contended that they are not tithes of corn or grain; but it is not necessary to decide whether they are or are not within that description (though I think there is a great deal to be said to prove them within it), but they are clearly to be considered as rectorial tithes, if not great tithes. This is a demise not merely of great tithes, but *of all rectorial tithes whatsoever*. Assuming that the words "great tithes" and "rectorial tithes," are not synonymous, yet the lease must be construed in the strongest sense against the lessor. If, therefore, "rectorial and great tithes" be not synonymous, yet if these are great tithes, they will go to the plaintiff; and supposing the words "rectorial tithes" may mean something different from "great tithes," I apprehend they will comprehend all tithes to which the vicar is not entitled. But it appears to me in fact that these are great tithes, and that we are bound by law so to consider them. So long back as the time of Lord *Coke*, they were so treated, and he mentions them under the class of great tithes by name, as a well known instance. In *Smith* v. *Hodgson* (a), tares, even when cut green, were held to be great tithe; subsequently to that time, *Comyns*, C. B., considered, that if they were cut green they would be a small tithe, but he said, that if they were suffered to stand till ripe, then they would be a great tithe; and Lord Keeper *Henley*, in *Sims* v. *Bennett*, seems to entertain no doubt of the correctness of that decision. According to what is stated by Lord *Henley* in that case, seeds are to be considered great or small tithe from their nature, whether the plant be cut green or suffered to stand till ripe. Tares in their nature, are more like corn or pulse than things which are commonly considered as seed. In that case, peas were clearly held to

(a) 2 Wood, 21.

be great tithe, within the meaning of the word garba. Tares also are a species of garba, because they are harvested in the same way, and are threshed like oats and other well known grain. Considering therefore the nature of this article, the manner in which it is treated, and the decided authorities on the subject, I am clearly of opinion, that this is a great tithe to which the plaintiff is entitled as lessee of the impropriator.

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BEST, J.—My mind has fluctuated very much during this argument, and I am only certain that the opinion I have now formed is right, because I at last agree with my learned Brothers. Until a very late period of the argument, I was inclined to think that these were to be considered *seeds*, and if so, that the vicar was entitled to them. Though this case has been sent to us, as a mixed question of law and fact, yet the real point for our consideration is purely a question of law, namely, whether seed tares are a great tithe, and passed under the terms "decimas garbarum, et granorum." I think there is no very intelligible principle on which we can decide what are small and what great tithes. For a great length of time, the Judges of *Westminster Hall* felt the difficulty, and therefore considered it at all times as a question of fact, referrible to the state of the particular parish, and the extent of the cultivation of the particular article. That course of proceeding has been abandoned, and it is now settled, that the question of great or small tithe depends on the usage of the particular parish, and on the nature of the thing itself. I could have wished at the same time that this rule was laid down, the cases had more distinctly pointed out what things in their nature were great, and what small tithes. The Courts have decided on the principle that in ancient times certain things which were of great value, as objects of commerce and barter, were considered great, whilst others cultivated only for the use of the farmer and his own family, and therefore of little value, were considered small tithes; but it would now be exceedingly diffi-

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cult to decide what was in ancient times of great, and what of small value, for it is very extraordinary, that many of the things then considered of small value, and classed among small tithes, are now of the greatest importance in commerce. For instance, hemp and flax, of which great quantities are grown, are worth considerably more than some other articles of agricultural produce. When that change took place, or by what means it was effected, I have no means of knowing. Probably the extension of the manufactories of the country, and the increased use of hemp and flax, in the expression of oil, compared with ancient times, may account for the enhanced value of those articles. However, not having the means of knowledge, possessed by the great authorities who have laid down this as the principle, the only course I can take is to consider that as a great tithe which approaches nearest to those things for which I have positive authority, (it being more a question of authority than principle), and then to consider that as a small tithe which, in its nature, approaches to those articles which I have also positive authority for saying are small. I am warranted in taking this course, by the case of *Udall* v. *Tindall* (a), in which all the Judges resolved "that woad growing in the nature of an herb, the tithe thereof ought to be reputed for minutæ decimæ." That appears to be the only safe rule to act upon, and the question is, whether the seeds of tares or vetches are to be considered as grain, or as seeds. Undoubtedly if we are to judge of what happened in former times by referring to our own, we shall find, that in our own times, seeds, generally speaking, are used as seeds, and seeds only. By that I mean, seeds when they are used only for the re-production of their own species. As far as my knowledge extends on this subject, the seeds of vetches are not used in general for any purpose, but the re-production of their own species, and if I were to look at it in that point of view, I should be disposed to consider it as seed, and not as grain. But the civilians have been our teachers on

(a) Cro. Car. 28.

the law of tithes; and it appears to me that *Lindwood* decides the question whether this is to be considered seed or grain, and if he decides, that it is not seed, but grain, then we have the authority of my Lord Keeper *Henley*, in *Sims* v. *Bennett*, that it is great and not small tithe; and his judgment is confirmed by the House of Lords. *Lindwood*, in his commentary on the fourth canon (*a*), after setting it out, "Erroris damnabilis devio excœcati suarum animarum excidia non devitant, dum frugum suarum decimam garbam solventes pro labore metentibus, &c.," observes on the word "frugum," and says, "Harum appellatione larga continetur reditus, et non solum talis qui *de frumentis et leguminibus*, verum, &c." He then enumerates articles which it is not necessary to mention. Now if we were to stop at "de frumentis," that would mean such grain as is used for the sustentation of man; but he uses also the word "leguminibus." What are legumina? I translate that to mean pulse. We have the word "pulse" in *English*, which means those plants which produce their seed in pods, a definition which applies to peas, beans, tares, and many other articles. But we have the direct authority of *Comyns*, C. B. in *Wallis* v. *Pain*, on this point, where he says (*b*), "perhaps there may be a proper distinction as to peas, beans, *or other pulse*." What are other pulse? Why, all other pulse of that class of leguminous plants. Now tares are of that class, and are to be considered within that distinction; and he adds, "because they had existence in former times, and appropriations were made *de bladis et leguminibus*, to religious houses." It has been very forcibly argued for the plaintiff, that tares had been in existence in former times, and that these might have been the subject of bargain between the religious houses and their vicars. It appears to me, therefore, that these tares range themselves within the definition of leguminous plants, and not within the definition of seeds. *Lindwood* also gives the same definition (*c*), and enumerates seeds in contradistinction to

(*a*) Page 188. (*b*) 2 Com. 639. (*c*) Page 188.

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frumenta, et legumina, and other articles. The question is, what is this article most like; and having decided that, we are to be governed by the rule laid down in *Udall* v. *Tindall*. No period of time has been pointed out at which tares have ever been enumerated amongst seeds. If *Lindwood* considered them as "seeds," he would have mentioned so important an article amongst the several seeds which have been enumerated; and the only way to explain the omission, is to consider him as having before included tares within leguminous plants. Then, if it is not seed, we have the authority of my Lord Chief Baron *Comyns*, that it is a great and not a small tithe. The judgment of Lord Keeper *Henly* is also in point. Dr. *Burn*, who held the situation of an Ecclesiastical Judge, enters into an enumeration of the different descriptions of tithe; he mentions, under the class of corn and grain, "tares and vetches," which are not mentioned under the next head, which is "hay and seeds." Throughout, he assigns them to the class of pulse or leguminous plants, which certainly are within the definition of great tithes; and if they fall within that definition, then they come within the description "decimas garbarum et granorum." I agree in the observations of my learned Brothers, as to the effect to be given to the grant of Queen *Elizabeth*. Most undoubtedly, the crown intended to give to the lay impropriator all those tithes which did not belong to the vicar. If tares fall within the class of small tithes, then I agree that the grant did not give them to the impropriator, but the usage is extremely material, and is here most decisive, because it shews that it has been always understood in this parish that these are included in the words "garbarum et granorum," and have gone to the rector. For these reasons, I am now of opinion that the plaintiff is entitled to judgment.

Postea to the plaintiff.

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The Earl of PORTMORE *v.* BUNN, Esq.

COVENANT. Declaration stated, that by indenture, bearing date 19th *June*, 1798, between plaintiff and *B. Langton* (since deceased), of the one part, and *A. Raby*, of the other; plaintiff and *B. L.* granted licence and permission to *A. R.* to continue a passage through the west bank of the river *Wey*, near a place called *Cox's Lock*, upon condition that *A. R.* would repair or rebuild, in a workman-like manner, and to the satisfaction of the plaintiff and *B. L.*, their heirs, &c., in and upon the said passage, the head or tumbling bay there, in order that the surplus water of the said river, which would otherwise run through the sluices of the said lock, should pass over the head or tumbling bay, through the channel belonging to the mills of *A. R.* adjoining to the west side of the said lock. A similar licence was set out, to continue certain other channels, for the term of twenty-one years from the 24th *June*, 1798, for the purpose of working the mills of *Raby* in such manner that the waste water which should run over the head or tumbling bay, should run again into the river *Wey*. It was further stated, that plaintiff and *B. L.* granted licence and permission to *A. R.* to navigate the *Wey* with his own boats, between the tail of *Cox's Lock* and the river *Thames*, for the term of twenty-one years, carrying iron, coals, or other goods, paying, during the continuance of the term, one shilling per ton for iron or other goods, and one shilling per chaldron for coals; with a proviso that *Raby, his executors, administrators, and assigns* (which words were not in the deed), should carry in his or their boats along the river *Wey*, all the iron made at the said mills, and that in case *Raby* should not yearly carry to the amount of 4500 tons of iron or chaldrons of coals, " the said *A. R.* should pay to the plaintiff and *B. L.*, their heirs and assigns, yearly and every year,

Where a declaration in covenant against *A.* the assignee of a lease for years [granting licence to *B.* to continue a certain channel through the bank of a navigable river, upon certain conditions], imported that the grantors had absolute possession of the channel, and full power to grant the use of it to *B.*, and it appeared from the indenture itself, that they were described merely as the persons "who have the greatest proportion or share in the profits of the said river, and that they by virtue of all or any powers and authorities vesting in, or enabling them, granted the licence to *B.*, his executors, administrators and assigns:" Held, first, that this was a variance; and, second, that the grantors had no authority to grant such an hereditament, within the meaning of 32 *Hen.* 8. c. 34, as would bind the assignee of the grantee.

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during the said term, so much money as would make up the amount of the tonnage equal to 4500 tons or chaldrons: it being the intent of the said parties that there should be paid to the plaintiff *B. L.*, their heirs and assigns, at least the net and clear yearly sum of 225*l.*" The declaration then stated, that on the 1st *January*, 1808, *Raby's* interest in the term was assigned to the defendant, and averred, that on the 24th *June*, 1819, the sum of 675*l.* for three years of the term, and of 500*l.* for tonnage of certain goods, became due and was in arrear; breach, "that the defendant hath not kept the said covenants so made by the said *A. R.* for himself, *and his assigns*, but, &c." Pleas, first, non est factum of *Raby*, and second, "that all the estate, right, title, interest, term of years, then to come and unexpired, property, profit, claim, and demand whatsoever, of and in the said demised premises, benefits and advantages, with the appurtenances by assignment thereof made, did not legally come to and vest in the said defendant; concluding to the country, and issues thereon. At the trial before *Richards*, C. B., at the *Summer* Assizes for the county of *Surrey*, 1822, the deed of 19th *June*, 1798, was produced, from which it appeared, that the plaintiff and Mr. *Langton* were there described as "the persons who have the greatest proportion or share in the profits of the river *Wey*," and that they, "by virtue of all or any powers and authorities vesting in, or enabling them," granted the licence to "*Alexander Raby, his executors, administrators, and assigns.*" A private act of parliament of 22 & 23 *Car.* 2. was referred to by the plaintiff's counsel, by which the river *Wey* was declared to be a navigable river for ever, and the soil of the river and its banks were vested in certain trustees therein named, (of whom neither the plaintiff nor Mr. *Langton* was one), their heirs and assigns, upon certain trusts mentioned, with authority to collect the profits and to elect new trustees. The act further provided, that it should be lawful for the trustees, with the consent of any two such persons as shall have the greatest proportion of the profits, to ap-

point a receiver of the profits of the navigation. The plaintiff having produced primâ facia evidence that the mills had come into the possession of the defendant by assignment, two objections were taken for the defendant, first, that the declaration imported, that the plaintiff and Mr. *Langton* were the sole proprietors of the river *Wey*, and had granted the licence to *Raby* in that character, whereas, from the indenture it appeared, that they had but a limited interest in the river, and had no authority to convey an unqualified licence (*a*); and second, that the covenant in the deed did not run with the land, and consequently could not support an action against the defendant, as assignee of *Raby* the lessee, he not being described as such assignee. The learned Judge reserved both points, and a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit, or to arrest the judgment.

*Marryatt*, in *Michaelmas* Term last, having obtained a rule nisi in the alternative, upon both points,

*Chitty* now shewed cause, and contended, first, that there was no material variance between the declaration and the deed. The words "persons who have the greatest proportion or share in the profits of the river *Wey*," are mere words of description, and may be treated as surplusage. They are in an immaterial part of the deed, and do not at all affect the power of the grantor to demise; they may therefore be altogether rejected as any other immaterial description, such as executor or administrator, may be. Secondly, the interest granted by this deed is clearly one arising out of the land, and it is at least an "hereditament" within the statute 32 *Hen.* 8. c. 34, which passed to the assignee, and rendered the covenant binding upon him. The

(*a*) Another objection, on the ground of variance, was taken, but not afterwards pressed, namely, that in the declaration the licence purported to be granted to *Raby* only, whereas, from the deed itself, it appeared to have been to him, *his executors, administrators, and assigns*.

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subject-matter of demise here is precisely similar in its nature to that in *Buckeridge* v. *Ingram* (a), where it was held, that shares in a navigation were realties, and could not pass under a will executed only for the passing of personal estate. But as *Raby* has actually taken an interest from Lord *Portmore*, upon payment of an ascertained rent, his assignee is estopped from saying that it is not such an estate as the original lessor had power to grant; it is not competent to him to raise such an objection, *Blake* v. *Foster* (b). The liability of the assignee of the grantee cannot depend upon the title of the grantor, nor even if that title be bad, does it lie in the mouth of the assignee to plead its sufficiency, after he has accepted an interest under it. No case can be cited in which it has been held, that the question whether a covenant does or does not run with the land, had any dependance upon, or reference to, the nature of the lessor's title; it is enough if the subject-matter of the demise be such as that in fact it passed to the assignee, which in this case it did. He also cited *Fairtitle* v. *Gilbert* (c), and *Webb* v. *Russell* (d).

*Barnewall*, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion, first, that there is a fatal variance between the declaration and the deed in this case, and second, that no such hereditament as would pass to the assignee, was created by the deed, or had ever existed in the plaintiff. The declaration alleges, that the plaintiff and Mr. *Langton* had granted to Mr. *Raby* a licence to continue a certain channel through the bank of the river, which clearly imports that they had the absolute and unrestricted possession of that channel, and the full power to grant the use of it to their lessee, and to perpetuate that use during the whole period of the term demised, either to their lessee or his assignee. Had they really possessed the

(a) 2 Ves. jun. 652.
(b) 8 T. R. 487.
(c) 2 T. R. 171.
(d) 3 T. R. 393.

right and the power which the declaration assumes, I am not prepared to say that the lease or licence would not have passed an hereditament, within the meaning of the statute 32 *Hen.* 8, because, in that case, there would have been a positive privilege received by the lessee, to be enjoyed by him and his assignees during the term demised. But is the language of the lease consistent with that in the declaration? Does it aver any such power in the grantor, and does it transfer any such privilege to the grantee? The grantors in the lease give themselves this description, "the persons who have the greatest proportion or share in the profits of the river *Wey;*" clearly shewing that they do not claim the entire interest in, or power over, the river, but that they have a limited proportion of it only. Now it is an established rule of law, that where the interest of the grantor is limited, it cannot be extended by the use of general words in the grant, and that where a person being in fact interested only in part of an estate, grants away the whole, the grant is measured by his interest, and conveys no more than he had it in his power to convey. Thus, therefore, there is a clear variance between the deed and the declaration, for the one imports a grant of the whole subject-matter, and the other of a part only. But the difficulty does not stop here. If we consider the nature of the right vested in these grantors, it becomes apparent that they had no power to grant such an hereditament as would satisfy the requisites of the statute, or would support this declaration. It is evident, that the concurrence of *all* the proprietors of the river is necessary to the transfer of any right or interest in it, and that concurrence the grantors could not possibly insure. The grantee under this lease might at any moment be ousted by any one of the other proprietors, and therefore he was in fact invested with no definite, permanent, or assignable right under it. Nothing passed to him, the possession and enjoyment of which he could insist upon even for himself, much less assign to another. The

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grant is merely the licence of two out of many co-proprietors to do a certain act, and enjoy certain privileges, and that cannot be considered as an hereditament which would pass, either as respects its privileges or its liabilities, to the assignee of the grantee. The argument, as to the estoppel, it is unnecessary to notice, because the plaintiff had no power to grant any interest, and the defendant consequently could take no interest under him; and the question whether the latter is estopped from disputing the title of the former does not arise in the case. Upon both points, therefore, I am of opinion that the present action cannot be supported.

HOLROYD, J.—I am also of opinion that there is a fatal variance between the declaration and the deed, and that if the deed had been fully set out in the pleadings, the defendant, as assignee, would not have been answerable in this action. The declaration states the whole interest in the navigation to belong to Lord *Portmore* and Mr. *Langton*, without any limit. The deed describes a positive and specified limit to their interest, such a limit as renders it wholly impossible for them to transfer to any person the rights and privileges mentioned in the declaration. They have by the language of the deed no estate themselves; nothing upon which they can grant an hereditament; they are in possession of a mere licence or privilege, and they hold it under a mere personal contract. They are entitled to a certain proportion of the profits of the navigation, but they do not even pretend that they have any title to the navigation itself; the utmost they claim is an incorporeal hereditament up to a certain amount, and not that they possess such an hereditament, arising generally out of the navigation, as they can transfer to any assignee. It is quite clear that they had no such hereditament, that they had no estate, either legal or equitable, which it was in their power to assign, and therefore the defendant took no such estate from them. If the deed had been set out, I have no doubt that the defendant

might have demurred with success, and in the present state of the record, I am of opinion that the action cannot be maintained.

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BEST, J.—This is an action founded upon a covenant, by which, as it is set out in the declaration, it appears that certain persons, of whom the plaintiff is here the representative, claim a right to grant an easement out of land, such as would amount to an hereditament; and in that view this case would certainly be governed by the principle laid down in *Buckeridge* v. *Ingram*. To this action the defendant has pleaded first, that the deed is not *Raby's* deed; and, second, that the interest which *Raby* took under that deed, did not pass to him, the defendant. We then naturally look into the deed, and what do we find it to be? It shews most clearly that the original lessors had no such right; that they possessed no interest in the land; but that they were simply shareholders of the profits arising out of the navigation. They have no power therefore to convey any interest in the soil, or to grant any easement out of it; and in this view, the case cited becomes a direct authority against the plaintiff, because where there is not an entire interest in the soil, vested in the grantor, he cannot grant an easement arising out of it to another. Here then is a fatal variance between the deed and the declaration. Then the second plea is as decisive against the plaintiff, by the very terms of the deed, as the first; because no hereditament can pass to the defendant from *Raby*, for the plainest of all reasons, that none could pass, or had passed from the original grantors to *Raby*.

Postea to the defendant (*a*).

(*a*) Vide *The Duke of Newcastle* v. *Clarke*, 2 J. B. Moore, 666. *Hollis* v. *Goldfinch*, ante, vol. ii. 316; and *Doe* v. *Wood*, 2 B. & A. 724.

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In a lease for years of a messuage and premises in a public street, lessor covenanted, that lessee, his executors, &c. should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business, *that may be, or grow, or lead to be, offensive*, or *any annoyance or disturbance* to" any of the other tenants of lessor, &c. Lessee granted an under-lease of the premises (subject to the like covenant) to *A.*, who opened them in the business of a *licensed victualler*, which was not one of the businesses enumerated in the covenant: Held, that by such acts, the covenant was not broken.

THE following case was sent for the opinion of this Court, by his Honor the Master of the Rolls:—

At the time of granting the lease hereinafter next mentioned, *Thomas Postlethwaite* was possessed of the premises thereby demised, and of other houses, buildings, and premises adjoining thereto, and in the neighbourhood thereof, under a lease granted to him by *Elizabeth Doughty*, of *Bedford Row*, and such several adjoining and neighbouring premises, or the greater part thereof, were occupied by his tenants.

By indenture of lease, dated 1st *February*, 1806, and made between the said *T. Postlethwaite*, of the first part; *Anne Edmonds* and *William Ulyate*, of the second part; and the defendant *William Thorne*, of the third part, it was witnessed, that for the considerations therein mentioned, the said *T. P.*, at the request of the said *A. E.* and *W. U.*, did demise to the said *W. T.* a piece or parcel of ground, situate on the west side of *Gray's Inn Lane Road*, in the county of *Middlesex*; abutting eastward on *Gray's Inn Lane Road*; southward, on ground leased to *W. P. Ulyate*; westward, on an intended mews; and northward, on ground leased to *Peter Brown*, and containing the several quantities and dimensions therein stated, together with the double brick messuage erected and built on the whole front of the said ground towards the east, and the workshops and buildings behind, and which said messuage is the third house southward from *Guildford Street*, the corner house inclusive; to hold from the 24th *June* then last past for a term of eighty-six years, wanting ten days, at a yearly rent of 10*l.* 10*s.*, payable as therein mentioned; and in which said lease, amongst others, is contained a covenant on the part of the said *W. T.*, in the words and figures following, that is to say, "That he the said *W. T.*, his executors, &c. shall not, nor will, at any time during the said term, do, or wittingly,

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or willingly cause or suffer, to be done, any act, matter, or thing whatsoever, in or upon the said demised premises, or any part thereof, which may be, grow, or lead to the damage, annoyance, or disturbance of the said *T. P.*, his executors, &c. or any of his or their tenants, or to any of the tenants of Mrs. *Elizabeth Doughty*, of *Bedford Row*, her heirs or assigns, in the said parish of *St. Pancras*, or to any part of the neighbourhood;" and there is also contained in the said lease a proviso, in the words and figures following, that is to say, "Provided always nevertheless, and these presents are upon this express condition, that if it shall happen that the said yearly rent or sum of 10*l.* 10*s.*, or any part thereof, shall at any time or times during this demise happen to be in arrear and unpaid, in part or in all, by the space of fourteen days next, over, or after either or any of the said days or times whereon the same ought to be paid as aforesaid; or if the said *W. T.*, his executors, &c. shall happen to fail or make default in the due performance of all or any of the covenants and agreements hereinbefore contained on his and their part and behalf to be performed, &c.; or if the said *W. T.*, his executors, &c. shall permit or suffer any person or persons to inhabit or dwell in or upon the said demised messuage, &c. or any part thereof, who shall therein or thereupon use or carry on the trades or businesses of a brewer, bagnio-keeper, distiller, dyer, pipe-burner, melting tallow-chandler, soap-boiler, farrier, smith, or iron-founder, or permit or suffer a forge to be erected thereon, or on any part thereof, or suffer the same to be made use of as a spunging or lock-up-house, or sheriff's office, lottery office, or any other public office whatsoever, or as or for any auction or sale room, or broker's shop, or any other trade or business, that may be, or grow or lead to be offensive, or any annoyance or disturbance to any of the tenants of the said *T. P.*, his executors, &c. or his or their landlady, her heirs or assigns; or if the said *W. T.*, his executors, &c. shall at any time within the space of seven years next before the expiration of the said term of eighty-

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six years, wanting ten days, assign or set over this indenture of lease, or any part of the said premises, without the licence and consent of the said *T. P.*, his executors, &c. then and from thenceforth, in any or either of the said cases, it shall and may be lawful to and for the said *T. P.*, his executors, &c. into and upon the said hereby demised premises, or into and upon any part thereof, in the name of the whole, wholly to re-enter, and the same to have again, retain, re-possess, and enjoy, as in his or their former estate; and thereout and from thence the said *W. T.*, his executors, &c. and all other occupiers and tenants thereof, utterly to expel, put out, and amove, this indenture or any thing therein contained to the contrary thereof, in any wise notwithstanding."

The defendant under this lease entered into possession of the premises, and in *September*, 1821, he entered into a written agreement with the plaintiff, whereby, after reciting the former lease, he agreed to let the premises to the plaintiff for the residue of his term, from *Michaelmas* 1821, for a premium of 650*l.*, and at a rent of 60*l.* per annum, "subject to the like covenants as in the said original lease," which sub-lease the plaintiff agreed to accept, "and to indemnify and save harmless the said *W. T.* from all damages and expences, in case the said *C. J.* shall open the house as a licensed victualler." Pursuant to this agreement a lease was duly executed by the defendant to the plaintiff, and the premises have since been opened by the plaintiff as a public house, under a licence obtained by him previous to the execution of the lease, and of which the defendant had notice before he executed the lease.

The question for the opinion of the Court is, whether by the granting the lease by the defendant to the plaintiff, and the opening the house as a public-house, or by either of those acts, the covenants and provisoes in the lease from *Postlethwaite* to the defendant, or any, or either of them, have or hath been broken.

*Marryatt*, for the plaintiff. The real contest between these parties is, whether the defendant is liable to execute another lease to the plaintiff, and it is clear that the former lease having been forfeited, he is liable. The proviso in the original lease is, that no business shall be carried on in the house which "may be, or grow, or lead to be offensive." Now it cannot be doubted that the act of opening a public-house may *grow or lead to be offensive*, even it be not so in the first instance. Who, for instance, would choose to reside next door to a public-house, if he could avoid it? Of all the trades enumerated in the lease, there is none so likely to become a nuisance as that of a publican. A public-house is necessarily a place of public resort, and generally not of the most agreeable description; and it was evidently the intention of the lessor to prevent the house becoming a place of public resort of any kind. That intention is certainly defeated by the change which has been effected, and therefore the lease becomes void. [*Bayley*, J. Can we say that the covenant is broken until the business has become actually and positively offensive?] Certainly. The words of the lease are contingent and prospective; they prohibit any trade that is likely to become offensive, and the trade of a publican unquestionably is. [*Best*, J. Can we take judicial notice of the fact that a public-house is per se, likely to become a nuisance?] The Court will look to the intention of the parties when the lease was framed. It has been decided that a covenant "not to use, or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever," is broken by an assignment to a schoolmaster, who kept his school upon the premises, *Doe* v. *Keeling*(a); which is a much weaker and more general covenant than the present. [*Best*, J. A school is a business, and therefore fell within that covenant; it is also a very noisy business, and might more reasonably fall within the present covenant than a public-house. May not a pub-

(a) 1 M. & S. 95.

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lic-house, if properly regulated, instead of a nuisance, be a very great convenience to the neighbours?] It never can be any other than "offensive;" its very nature, and the character of the persons likely to frequent it, necessarily render it so. The case of *Doe* v. *Keeling* was decided upon the principle of considering the intention of the parties; that principle will govern the Court here, and in concurrence with that view of the case, this lease is void. In addition to this, it is evident that the parties to the second lease thought it probable that the public-house might be considered a nuisance, because they inserted in it a covenant to indemnify the defendant in case he opened the house as such.

*Littledale*, contrà. This is a question of fact, not of law, and more proper for the decision of a Jury than of this Court. A public-house may, or may not, be a nuisance, according to the mode in which it is conducted. It is to be observed, that the business of a publican is not one of those enumerated in the lease, and those which are there enumerated are actually in themselves trades, likely to produce annoyance, which a public-house certainly is not. The trades that are mentioned in the lease are all necessarily attended with smoke, smell, noise, public resort, or danger of fire; none of which evils are at all necessarily, nor generally attendant on the business of a publican. It is an old rule of law, and one which has never been broken in upon, that general words shall not extend to particular cases, *The Archbishop of Canterbury's* case (a); and the same rule of construction is well laid down by *Holt*, C. J., in the case of *The Countess of Bridgwater* (b). But if the construction contended for on the other side were to prevail, no trade of any kind could be carried on in the metropolis; for every trade may by mismanagement be rendered a nuisance in its immediate neighbourhood. If a public-house is to be considered per se a nuisance, then must a coffee-

(a) 2 Rep. 46. (b) 6 Mod. 106.

house, or a tavern, be considered a nuisance also, however respectable in itself, and however respectably frequented.

*Marryatt*, in reply. In the original lease there are additional words of prohibition, evidently meant to apply to those trades which are not specified, and therefore the rule of construction laid down in the cases just cited does not affect the present case. The only question is, what is the general tendency of a public-house, and universal experience answers that it is likely to be "offensive;" and upon that single point it is clear that the trade of a publican was intended to be excluded by the original lease (a).

BAYLEY, J.—Your argument must go this length, that every public-house is, per se, and under any circumstances, a nuisance. Can we hold that to be law? I doubt not. We will, however, consider of the case, and certify our opinion to the Master of the Rolls.

The following certificate was afterwards sent to the Master of the Rolls:—

This case has been argued before us, and we are of opinion that by the granting the lease by the said *William Thorne* to *Charles Jones*, and the opening the said messuage or tenement as a public-house, or by either of those acts, the covenants or provisoes contained in the lease have not been broken.

J. BAYLEY,
J. S. HOLROYD,
W. D. BEST.

(a) Vide *Spencer* v. *Marriott*, ante, vol. ii. p. 665.

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## NEALE, Widow, Administratrix of WHITTLE, deceased, v. REID and Another.

A. sells goods to B. in America, to be shipped for an European port, and paid for by bills in different sets, and at different dates, drawn by B. in favor of A. upon C. and Co. a mercantile house in London, D. is appointed supercargo and joint-trustee by A. and B. for securing remittances to the house in London, for the honor of the bills. The goods being shipped for Europe, B. and D. respectively advise C. and Co. of the transaction, who effect insurance upon the cargo, by B.'s directions, and at his expence. The ship in her voyage is captured, and B. abandons the cargo to the underwriters as for a total loss, the amount of which is paid to C. and Co. in London, who place it to the credit of B. The London house honor the first set of bills before any fruits are received from the policy, and advise A. of that fact, in consequence of a letter received from him upon the subject of the bills, informing him that they could then say nothing about the other bills, as the fate of them would depend (not being accepted) upon the state of B.'s account when they became due, with an assurance, however, that they would do every thing they could with propriety, to further the views of all parties. By a subsequent letter, they advise him of the payment of a second set, stating that they did not know what would be the fate of the third, which had not then appeared for acceptance; but that they would do all they could to prevent loss to the parties; part of the remaining set of bills is subsequently paid, but the rest is refused payment by C. and Co. B. becomes bankrupt, and C. and Co. account with him prior to, and with his assignees, subsequent to his bankruptcy, for all the money ever received by them on his account. A. receives under B.'s commission, a dividend upon the bills remaining unpaid, and for the balance his administrator brings an action for money had and received, against C. and Co.:— Held, that the action was not maintainable.

ASSUMPSIT for money had and received by the defendants, to the use of *Conway Whittle*, and upon an account stated with him. Plea, the general issue. At the trial before *Bayley*, J., at the *London* adjourned Sittings after *Trinity* Term, 1820, the plaintiff had a verdict, damages 3171*l.*, subject to the opinion of the Court upon the following case.

On the 22d *January*, 1800, the deceased *Conway Whittle*, and *John George Williams*, being at *Norfolk* in *Virginia*, *Whittle* sold to *Williams* 1771 boxes of sugar, for the price of 27,201*l.* 17*s.* 8*d.*, on the terms, that the same should be shipped and consigned from thence on board the ship *Martin* for *Lisbon*, and should be paid for by bills of exchange, to be drawn by *Williams* on the defendants, payable to the order of *Whittle*; and for the better security of *Whittle*, it was agreed that *John Davidson* should proceed with the sugar as supercargo, on the terms hereafter expressed to have been indorsed on the bill of lading. The sugar was shipped accordingly, and *Williams*, in payment for the same, drew bills of exchange on the defendants, in three distinct sets, each set for 9067*l.* 5*s.* 10*d.*, being one third

of the whole price, payable to the order of *Whittle*, to whom they were delivered in payment of the sugar by *Williams*. The invoice was in the usual form, and the sugars having been been shipped, the captain signed four parts of a bill of lading, and the following indorsement was written on each, which was signed by *Whittle* and *Williams*.

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"The within cargo having been purchased by the said *J. G. Williams*, payable by bills of Messrs. *Reid, Irving*, and *Co.* of *London*, agreeably to invoice hereto annexed, and the said *Conway Whittle* and the said *J. G. Williams* having appointed the said *John Davidson* their joint trustee, for the purpose of securing the remittance of 27,201*l.* 17*s.* 8*d.* to the said Messrs. *Reid, Irving* and *Co.*, to meet the payment of the said bills, out of the proceeds of the said cargo, it is hereby declared, that on the said *John Davidson* being satisfied for the sum above-mentioned, the bill of lading is to be delivered to the said *J. G. Williams*, who is to appoint the port or ports of destination, and the house who is to make sale of the cargo."

On the 23d *January*, 1800, *Williams* advised defendants of the shipment, with instructions to effect insurances on the cargo to the extent of 35,000*l.*, which was done accordingly on the 13th *March* following, at premiums to the amount of 7907*l.*, which was charged to *Williams*'s account. Before the vessel arrived at *Lisbon*, she was captured by a *French* privateer. She was then abandoned to the underwriters, who paid a total loss of 35,000*l.* to the defendants, who placed the amount to *Williams*'s credit. The sugars were afterwards restored, and sold for 18,000*l.*, which the underwriters received. A letter, dated 30th *May*, 1800, was written by *Whittle* to defendants on the subject of the bills drawn by *Williams*, expressing a hope that they would take care to protect them when at maturity, intimating to them, that they would be amply covered by the proceeds of the policy. In answer to this, the defendants on the 23d *July*, 1800, advised *Whittle* that they had paid the first set of bills,

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adding, "we can say nothing, however, more at present upon the other bills, as the fate of them will depend, (not being accepted) upon the state of *Williams's* account when they become due." The defendants wrote a second letter to *Whittle*, on 23d *August*, 1800, informing him, that they had paid the second set of bills, which, together with those before paid, amounted to 18,134*l*. This letter contained the following paragraph, "We do not know what will be the fate of the third set, which have not yet appeared for acceptance, but we will do all we can to prevent loss to the parties." After this letter, the defendants paid some more of the bills, making, together with those before paid, the sum of 23,434*l*., but the remainder, amounting to 3,767*l*., they refused to pay. The case farther stated, that in 1802, *Williams* became bankrupt. By payments made to him before, and to his assignees, since his bankruptcy, the defendants had discharged themselves of all sums of money which they had ever received on his account. The plaintiffs intestate had received under *Williams's* commission dividends amounting to 596*l*. in respect of the bills remaining unpaid, and for the balance, this action was brought, and the question was, whether the defendants were justified in parting with the money received by them on the policy, without paying the remainder of the bills.

*Chitty*, for the plaintiff, contended, that under the circumstances of the case, it was the duty of the defendants to have held the proceeds of the policy, and appropriate them to the payment of the bills, and having neglected so to do, they were liable in this action. Had the cargo itself reached their hands, it was quite clear that it must have been applied in honor of the bills; and as the policy was effected merely for the purpose of guarding against loss, the money received upon it was subject to the like application. The letter from *Williams* to the defendant, desiring the policy to be effected, must be construed as a direction to them to hold it as a security for the payment of the bills. *Whittle*, in his letter to

the defendants, alludes to the insurance as a source from whence funds were to be derived; and the defendants in their answer, so far from disclaiming their liability to appropriate the money to the bills, actually inform him that they had paid one set, and say, as to the rest, merely, that their fate would depend upon the state of *Williams*'s account when they became due; so that this must be considered either as a conditional acceptance, or an undertaking on their part to apply the money derived from the policy, or such other money of *Williams* as came to their hands, to the discharge of the bills. At all events, the vendor was, in equity, entitled to the fruits of the policy on the cargo. He cited *Stevens* v. *Hill* (a), *Grant* v. *Austin* (b), and *Randoll* v. *Bell* (c).

*D. F. Jones*, contrà, was stopped by the Court.

BAYLEY, J.—The case of *Randoll* v. *Bell* is very distinguishable from the present. In that case the holder of a bill of exchange, *who held it in trust for the plaintiff*, having sued the drawer, and pending that suit become bankrupt, his assignees brought an action against the drawer in his name, and the sheriff having suffered an escape in that action, the assignees recovered against him in an action for the escape, damages to the amount of the bill. The question then arose, whether those damages enured to the benefit of the plaintiff, for whom the bankrupt was trustee, or for their benefit as his assignees; and it was held, that as they were recovered specifically for the plaintiff, they enured to him. It has been attempted to assimilate this case with that, by representing the defendants as trustees for *Whittle*, and that character is assigned them upon three grounds; first, the general nature of the transaction; second, the letter from *Williams* to the defendants, ordering an insurance to be effected; and third, the letters of the defendants in the months of *July* and *August*, giving ad-

(a) 5 Esp. N. P. C. 247. (b) 3 Price, 59. (c) 1 M. & S. 714.

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vice of the payments made by them, which letters, it is contended, amounted to a promise by them, to hold the money on account of the plaintiff. Now how is this view of the case borne out by the facts? *Williams* enters into a contract with *Whittle* to purchase goods of him, payable by bills drawn on the defendants. *Davidson* accompanies the shipment as supercargo, with orders not to give up possession of the goods until payment has actually been made. At that time *Whittle* had a security upon the goods, but did that give him a lien upon the policy of insurance also? I think clearly not. It was no part of the original contract that *Williams* should insure the goods, but he thinks proper to do so; and I am not aware of any case which has decided that a consignee effecting a policy upon goods under such circumstances, is liable to appropriate the proceeds of the policy to the purposes of the consignor; nor can I see any fair principle, either of law or justice, by which that liability could attach. *Williams* insured the goods for his own benefit, and at his own expence; the money which he expended in the insurance, his creditors became liable to lose, and therefore they are entitled to all the benefit that resulted from that risk. The money paid upon the policy was not a part of the proceeds of the goods; it was a substitute for those proceeds as respected him, but certainly was not liable to any other claims in the same way that the proceeds themselves would have been. Then what are the terms of the letter ordering the defendants to effect the insurance? There is not one word in it which can properly be construed as an order, binding them to apply the proceeds of the policy to the payment of the bills, nor can I imagine any motive the writer could have for intending so to bind them. It is a private letter, written for private purposes to his own confidential agents, and the probable object of making the insurance was to place in the hands of those agents, some security for the advances they might make in honor of his bills. The letter, therefore, was merely an intimation to the defendants, that they

would incur no danger by accepting the bills of *Williams*, and it contained no allusion to *Whittle*, and no order for any specific appropriation of the policy. It must be remembered, that the bills were all drawn, payable at a certain period after sight; it was therefore necessary that they should be presented for acceptance immediately upon their arrival, in order that the period of their maturity might begin to run; and therefore the order to make an insurance upon the goods was merely a method of shewing the defendants what security they would have to cover their advances, and was certainly no authority to them to hold the policy for the benefit of *Whittle*. But then, thirdly, it is contended, that the letters of *July* and *August* amount to a promise to accept, or at least to an agreement to appropriate the policy, and the money that should be received upon it, to the benefit of the plaintiff. I cannot concur in the argument, that the language of those letters amounts either to an immediate acceptance, or to a promise to accept hereafter, nor does it in my judgment constitute an undertaking to appropriate the proceeds of the policy to the payment of *Whittle's* bills. *Williams* might have insisted on having those proceeds applied to his own use in any manner he might choose to direct. I am therefore of opinion, that these letters afford no engagement on the part of the defendants to hold these proceeds for the benefit of *Whittle*, and consequently that the plaintiff has no claim upon them with reference to those proceeds.

HOLROYD, J.—I am of the same opinion. First, as to the nature of the transaction:—*Williams* purchases certain goods of *Whittle*; they are shipped under the superintendence of *Davidson*, who is empowered to retain the possession until he receives valid security for their value. The cargo is shipped on the account and at the risk of *Williams*, and whatever loss might be the result, was ultimately to fall on him. He was liable for the value of the goods, and he directs the defendants to insure them at his own expence

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and for his own security merely. The money arising from the policy, therefore, stood in a very different situation from that which might have arisen from the sale of the goods, and belonged entirely and exclusively to *Williams*, unless he appropriated it to some other use. He does appropriate it to the use of the defendants, and gives them a lien upon it, provided they accept the bills. *Williams*, therefore, might at any moment have demanded the proceeds of the policy as his own money in their hands, and indeed if he could not, he would stand in a situation of great hardship, because he was himself liable upon the bills in the first instance, if they did not accept them; and therefore he might have lost the amount of the policy on the one hand, and the amount of the bills on the other. His creditors, therefore, ran a heavy risk, and they were certainly entitled to the insurance-money as an indemnity. The correspondence does not seem to me to vary the case; I can see nothing like an acceptance, or a promise to appropriate the policy to the satisfaction of the bills.

Best, J.—If the plaintiff be entitled to any relief at all, she must seek it in a Court of Equity; in a Court of Law, however, this is a very clear case. Here is a sale of goods; and the seller can have no claim upon them after he has once parted with them, unless there is an express contract to that effect. Is there such a contract here? Is there any undertaking either to accept the bills, or to appropriate the insurance-money to them? I am of opinion there is not. Can the indorsement upon the bill of lading operate as such a contract? Certainly not; for the defendants were no parties to it when it was made; they never afterwards assented to it, and the indorsement itself referred solely to the proceeds, and had no relation whatever to the policy. *Whittle* indeed might have stipulated that the cargo should be insured, and that the policy should stand as a security for the payment of his claim; but he made no such

stipulation, and was no party to the insurance itself. Then there is clearly no implied contract that the policy should stand as a security to *Whittle*. The defendants had no right to retain the policy as against *Williams*; it was effected by his direction, at his expence, and for his benefit; and who but himself had any claim to it, or any power over over it? Suppose the cargo had come safe to hand, and had sold for only 18,000*l.* would *Williams* have been liable to make up the deficiency? And if not, under those circumstances, why should he be so liable when the cargo was captured on its way? As to the supposed acceptance by the defendants, I am of opinion, not only that their letters do not amount to an acceptance, but that they express quite a different meaning. They in fact contain a refusal to accept; and as to any undertaking to hold the policy for the benefit of *Whittle*, there is no part of the letters that can be construed in that view; indeed it was an act which they had no authority to do without the approbation and consent of *Williams*.

Judgment for the defendants.

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PRIDDY and Another *v.* HENBREY.

Debt lies by the drawer against the acceptor of a bill of exchange, expressed to be for value received in goods.

DEBT by the drawers against the acceptor of a bill of exchange for 40*l.* "*for value received in goods*," dated *Croydon*, 27th *March*, 1822, payable to the plaintiffs or their order, at the *Bull Inn, Leadenhall Street, London*, two months after date. Second count averred a general acceptance. There were other counts for goods sold and delivered. Demurrer to the first and second counts on the bill, and joinder therein. The question was, whether debt would lie by the drawer against the acceptor of a bill of exchange, under the circumstances of this case.

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This case was argued before *Bayley*, J., and *Holroyd*, J., in *Easter* Term, by *Crowder* in support of the demurrer, and by *Chitty* contrà.

The Court took time to consider the case, and judgment was now given by

Bayley, J.—This is an action of debt by the drawer against the acceptor of a bill of exchange; and the question is, whether under the particular circumstances of the case, that form of action can be maintained. Whether debt will lie in all cases by the drawer against the acceptor, is not the question, but whether it will lie under the particular circumstances of this case. The bill was payable to the plaintiffs, as the drawers, to their own order; and it imports to be "for value received in goods." The words "value received" must, according to *Highmore* v. *Primrose* (a), be understood to mean "*value received by the acceptor of the drawer.*" The acceptance here, therefore, is an admission by the defendant, not that he may hereafter receive, but that he has already received value in goods, and upon such an acceptance, we are of opinion that debt may be maintained. This case was extremely well argued by Mr. *Crowder*, and he referred us to several authorities in which it was held, that debt would not lie against the acceptor of a bill; but in none of those cases does the action appear to have been brought by the drawer upon a bill payable to his own order, and importing for value *previously* received. The reasons upon which those decisions are founded, invariably refer to the case where the drawer sues upon a bill not so framed. There are several authorities upon bills of exchange and promissory notes, in which the principle has been admitted without further consideration. The *Anonymous* case in *Hardres* (b) was an action by the payee against the acceptor of a bill of exchange drawn by a third person. The objection was, that there was no privity between the plaintiff and the defendant. Precedents were ordered to be searched,

(a) 5 M. & S. 65. (b) Page 485.

and it was shewn that by the opinion of *Hale*, C. B. debt lay not. Afterwards the Court delivered their opinions, that an action of debt would not lie on a bill of exchange against the acceptor, but that a special action on the case must be brought against him, for the acceptance did not create a duty no more than a promise made by a stranger to pay, &c. if the creditor would forbear his debt. Now between the parties in the present case, privity does exist. This is not a collateral engagement for the debt of a third person, but for the proper debt of the defendant, which he alone owed at the time of the acceptance, and for which, from thence hitherto, he hath been and still is debtor. The decision, therefore, in *Hardres* concludes nothing against the plaintiff here; on the contrary, the ground of the decision there makes rather for than against him. *Brown* v. *London* (*a*) was an action of indebitatus assumpsit, and in all its circumstances very much like the case in *Hardres*, which is in *Mod.* called *Milton*'s case. There *Twisden*, J. at first thought the action maintainable. That case was four times before the Court, and was decided by some of the Judges who joined in the decision in *Hardres*, one of whom was *Hale*, then Chief Justice, and their opinions were entirely founded on that case, which was decided about two years before. Therefore *Brown* v. *London* goes no further than the former decisions. I mention that it was four times before the Court, to shew that notwithstanding the case in *Hardres*, the Court considered it a matter of considerable doubt, and there was great difference of opinion. *Hodges* v. *Steward* (*b*) was an action on the case upon a bill of exchange, but the bill being payable to *J. S.* or bearer, and not to *J. S.* or order, the question was, whether such an action could be maintained by the indorsee. This case was not cited at the bar for the decision, but for certain dicta there mentioned, of *Holt*, C. J. whilst he sat in *London* to try causes. Therefore that case goes no fur-

(*a*) 1 Freem. 14. S.C. 1 Mod. 285. S. C. 1 Vent. 152. and 1 Lev. 293.
(*b*) Skinner, 346.

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ther than former decisions already mentioned. *Skinner*, in his report of that case, states, that "it was oftentimes said, that an indebitatus assumpsit does not lie upon a bill of exchange, as it has been ruled in divers cases," probably referring to the cases I have already mentioned, "but against a drawer for value received, then it would lie; but this is for the apparent consideration." Now the first of these decisions carries the case no farther than *Brown* v. *London*. That in *Skinner* is in favor of the plaintiff, for it is to the effect, that where the bill imports that it is for value received, indebitatus assumpsit may lie upon it. What *Gilbert*, C. B. says, in his Treatise on the Action of Debt, at the end of his Collection of Cases in Law and Equity, 364, is founded on the case in *Hardres* and *Brown* v. *London*, and applies only to the case where the payee who brings his action, is a different person from the drawer, in which case he says the drawer still continues liable. In *Webb* v. *Geddes* (a), which was an action of debt against the acceptor, the drawer and payee were probably the same person, but the only question was, whether bail in error was requisite. There were counts for goods sold and delivered, money lent, money paid, money had and received; and *Lawrence*, J. asks, "What count is there in this declaration, upon which, properly speaking, debt will lie? In *Hardr.* 685, Lord *Hale*, C. B. determined that debt would not lie against the acceptor of a bill of exchange; and Lord *Eldon* in this Court recognized the same doctrine; and it was determined in *Tryer* v. *Bridgeman*, that if there be one count for which bail in error is unnecessary, it is not necessary for any." That learned Judge, therefore, considers debt an improper form of action against the acceptor of a bill of exchange, within the authority of the cases cited. But *Chambre*, J. (who was a very able pleader, and no friend to innovations, and ever ready to express his opinion when he saw any attempted), being present, was silent upon the

(a) 1 Taunt. 540.

point, and instead of saying any thing against the plaintiff, said he extremely regretted being bound to conform to the rule which dispensed with bail in error, the cases being so. If that decision had been reversed, it would have been an authority for the defendant, but remaining undisturbed, it is directly in point for the plaintiff. These were all the cases cited for the defendant on the argument, and in no one of them is the principle to be found, that upon a bill payable to the drawer or his order, and importing to be for value previously received by the drawee, debt will not lie against the acceptor. On the other side we were referred to *Rumball* v. *Ball* (*a*), and 1 *Mod. Ent.* 812, pl. 13, in which it is said, that debt will lie against the maker of a note, but not against the indorser; and that question was fully considered in *Bishop* v. *Young* (*b*). That was an action of debt by the payee against the maker of a promissory note expressed to be for value received in goods. The Court took time to consider the case; and it is obvious from the elaborate judgment given by Lord *Eldon*, that much attention was bestowed on the subject. His Lordship said, the consideration was apparent upon the face of the note, and that it was an action of debt brought by the payee of the note, against the person who made and signed it, and not by the indorsee against the maker, or the indorser. It was insisted for the defendant, that under the circumstances, the action of debt would not lie, and several cases were cited in support of that proposition. The case particularly relied upon was *Welch* v. *Craig*, reported in 1 *Stra.* 680, and in 8 *Mod.* 373. He observed, that the report in *Strange* would render the application of the principle too general, if they were to hold as clear law, that without any exception, an indebitatus assumpsit would not lie on a foreign bill, inland bill, or promissory note. Notwithstanding, therefore, the general rule there laid down, there might be cases in which, upon inland bills or promissory notes, an action of debt or indebitatus assumpsit might be maintainable.

(*a*) 10 Mod. 38. (*b*) 2 Bos. & Pul. 78.

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He notices that in the argument in that case, the reason given why a general indebitatus assumpsit would not lie on a promissory note, was, *for want of a consideration.* "But it is observable," he says, "on the two reports in *Strange* and *Modern*, taken together, that the reason for holding that debt would not lie, was founded on the analogy of promissory notes to inland and foreign bills of exchange. If therefore it be true, that an action of debt, brought by the payee of an inland or foreign bill of exchange, against the drawer of such bill, will lie, it will remain to be considered whether the analogy will not require us to hold, in the case of a promissory note, having an apparent consideration, that an action of debt will lie if brought by the payee of such note against the maker. The case in *Hardres* seems to open the principles on which this case must be decided. The effect of that case, and of *Pearson* v. *Garret, Skin.* 398, are very accurately expressed in *Com. Dig.* tit. *Debt* (B). Lord C. B. *Comyns*, after having said that debt lies upon every express contract to pay a sum certain (*a*), and also, that it lies, though there be only an implied contract (*b*), thus states the principles of these cases. "So debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty. *R. Hard.* 485. So it does not lie upon a note to pay without consideration; though alleged that it binds by custom. *R. Skinn.* 398." After stating the reason why it was decided in *Milton's* case, that debt would not lie against the acceptor of a bill, the reason he says there is this, "that the acceptor's situation is analogous to that of a person who takes upon himself an obligation to pay that which is not his debt, but the debt of another, and therefore, looking at the effect of a bill of exchange, it was very reasonable to hold that the acceptor would not be generally liable in debt, for he is only liable for his own debt, but not that of another. "Agreeable to this," he says, "is *Hard*'s case, *Salk.* 22, where it is said, that indebitatus assumpsit will not lie

(*a*) Tit. Debt, (A. 8.) (*b*) Tit. Debt, (A. 9.)

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against the acceptor of a bill of exchange, for, his acceptance is but a collateral engagement, but that it will lie against the drawer, for he is really a debtor by the receipt of the money. He refers also to *Hodges* v. *Steward*, *Skin.* 346, where it was allowed by the Court, that debt will lie against the drawer of a bill of exchange for value received, and the reason given is, " but this is for the apparent consideration." After noticing *Rumball* v. *Ball* (*a*), he says, " indeed if it be true that an action of debt will lie against the drawer of a bill of exchange in favor of the payee, it seems to me to be the necessary effect of the statute of *Anne*, which puts notes on the same footing with bills of exchange, that debt may be maintained by the payee of a promissory note against the maker." His Lordship concludes, therefore, that in that particular case, debt might be maintained, but he guards against any inference that the action would lie by the payee against the maker, where the note does not express consideration upon the face of it. What is the principle decided by that case? It is this, that where there is a privity, independently of any security, as between the parties, and the debtor undertakes, not for another's debt, but for his own,—not to a stranger, but to a person to whom he owes the debt, and he enters into a contract to pay, an action of debt lies. Look to the analogy between the maker and payee of a note, and the drawer and acceptor of a bill of exchange. As between drawer and acceptor of a bill, the principle of that decision is precisely analogous to the case under consideration. The only difference is, that in the one case the party appears to act of his own accord by giving the note; in the other he acts upon request. If he gives a note, he gives an express promise to pay it, whether the instrument requires him to do so or not; whereas if he is the acceptor of a bill, he promises because he is requested; but the promise in each case, is in substance the same. Apply the principle of *Bishop* v. *Young* to this case. There is a privity between the plaintiff and defendant, independently of the

(*a*) 10 Mod. 38.

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bill. The defendant engages not for the debt of a third person, but for his own. He enters into that security to a person to whom he owes money, and the substance of his engagement is to pay that debt. There is one case therefore expressly in favor of the plaintiff. The case of *Webb* v. *Geddes* is also to the same effect. In the case of *Rudder* v. *Price* (*a*), and in *Barry* v. *Robinson* (*b*), though the circumstances in each were nearly the same, the objection was not taken; but these decisions, as far as they go, are conformable to those I have mentioned. The case of *Stratton* v. *Hill* (*c*), confirms the same doctrine, and extends it to bills of exchange. That was debt upon a bill of exchange by the indorsee against the drawer, and the plaintiff having recovered a verdict, a motion was made in arrest of judgment, on the ground that debt would not lie, and on cause being shewn, the Court held that it would. The only ground on which that decision could possibly have proceeded was, that between the immediate indorser and his indorsee there was privity. The indorsement implied that the indorser was debtor pro tanto to the indorsee, and that it was a contract by the indorser, that that debt should be duly paid. The argument arising from that case (and it is an argument à fortiori) is applicable to this, and that is a less favourable case than the present, because here is an immediate privity independently of the bill, between the plaintiff and the defendant. The defendant is the immediate debtor to the plaintiff, and contracts to pay the debt. Under these circumstances, we think the action of debt is maintainable. Had there been a want of immediate privity between the parties, or had the bill omitted to state consideration, the case might be different; but as there is privity and consideration stated, we think judgment should be for the plaintiff.

Judgment for the plaintiff.

(*a*) 1 H. Bl. 547. (*b*) 1 New Rep. 293. (*c*) 3 Price, 253.

## The KING v. LAWRENCE KENWORTHY.

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INDICTMENT for perjury. After conviction at the *Summer* Assizes for *Chester*, 1822, judgment was entered against the prisoner in the following form:—Wherefore all and singular the said premises being seen by the said justices here, and fully understood, it *is therefore ordered*, that he the said *Lawrence Kenworthy* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years; and that he the said *Lawrence Kenworthy* be in mercy, &c. Error being brought, the record was removed into this Court, and last Term

Where a prisoner was convicted of perjury in an inferior jurisdiction, and the sentence of transportation was entered on the record, as follows: "Wherefore all and singular the said premises being seen by the said justices here, and fully understood, it is therefore *ordered* that he the said *L. K.* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years, &c." Held, on error brought, that this was no judgment at all, and this Court awarded a procedendo to the Court below, commanding them to pronounce the proper judgment; but in the mean time allowed the prisoner to be bailed.

*D. F. Jones* argued the case for the prisoner, and contended, first, that the judgment was erroneous in form, in using the words "It is ordered," instead of "It is considered;" and second, that it was erroneous in substance, being a judgment of transportation only, without regard to the provisions of 2 *Geo.* 2. c. 25. s. 2, and 56 *Geo.* 3. c. 27. Upon the first point he cited 4 *Inst.* 70. *Robins* v. *Sambel* (*a*), *Coxe* v. *Cropwell* (*b*), *Robins* v. *Sanders* (*c*), *Slocomb's* case (*d*), *Gregory* v. *Eades* (*e*), *Peacock* v. *Bell* (*f*), *Ventris* v. *Carter* (*g*), *Campbell* v. *French* (*h*), and *Com. Dig.* tit. *Courts*, p. 13, to shew that the form of entering the judgment was contrary to all former practice. Then as to the second, the 2 *Geo.* 2. c. 25. s. 2, enacts, that judgment of transportation may be pronounced *besides* the punishment which might be before imposed, and therefore the Court below ought not to have given judgment of transportation only, but should have pronounced it as an additional punishment to intermediate confinement. It has been decided, that where the law appoints a particular punishment for any

(*a*) 3 Bulst. 92.
(*b*) Cro. Jac. 6.
(*c*) Id. 386.
(*d*) Cro. Car. 442.
(*e*) 1 Vent. 28.
(*f*) 1 Saund. 73.
(*g*) Yelv. 130.
(*h*) 6 T. R. 200.

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offence, there is no power to alter it in the judgment, either by addition or diminution. *Rex* v. *Walcott* (*a*), and *Rex* v. *Reed* (*b*). But according to 56 *Geo.* 3. c. 27, the judgment here is bad, because the Court below should either have sentenced the prisoner to be transported to such place as the king in council should appoint; or should have ordered him to be transported generally, leaving it to the crown to direct the place of transportation. Here the Court below has itself directed the place, which it had no power to do, and therefore the judgment is erroneous. The judgment being therefore erroneous, the prisoner is detained without any lawful authority, and is entitled to his discharge. The Court below cannot now correct its mistake by pronouncing the proper judgment, nor has this Court jurisdiction for that purpose; *Rex* v. *Baker* (*c*), and *Rex* v. *Nichols* (*d*). The statute under which the prisoner was indicted, directs that the judgment shall be pronounced by the Court before which the conviction takes place; and therefore this Court is ousted of jurisdiction.

*Littledale*, for the Crown, admitted that the judgment upon the prisoner could be pronounced by the Court below only; but he contended, that if this judgment was erroneous, it was no judgment at all, and therefore the prisoner must be remitted to the Sessions, and there receive the proper judgment, for which purpose this Court had jurisdiction. Error will not lie on that which is no judgment. Here there is in effect no judgment, and the writ of error is premature. The only course to be adopted by this Court is to order the inferior jurisdiction to award the proper judgment.

Abbott, C. J.—We are, upon the whole, of opinion, that the informalities and errors in the entry of the supposed

(*a*) 4 Mod. 395.
(*b*) 16 East, 404.
(*c*) Carth. 6.
(*d*) 13 East, 412. (n).

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judgment of the inferior Court in this case, are such, that we are driven to the necessity of treating it as no judgment at all. We are then called upon to act precisely as if no judgment had ever been passed, which certainly involves very considerable difficulty. The statute of 2 *Geo.* 2. c. 25. s. 2, is couched in very plain and imperative language. It directs, that "it shall and may be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt perjury, to *order* such person to be sent to some house of correction for a time not exceeding seven years, there to be kept to hard labour during all the time, or otherwise, to be transported to some of his majesty's plantations beyond the seas, for a term not exceeding seven years, and thereupon *judgment shall be given*, that the person convicted shall be committed or transported accordingly." Now, by this clause, there are two separate and distinct acts to be done; first, an order is to be made; and secondly, a judgment is to be given thereupon. In this case the order has been made, but no judgment has been given, and the question is, in what manner this Court can interfere under such extraordinary circumstances. If this had been an indictment at common law, there would have existed no difficulty in the case, because then the proceedings of the Court below might have been removed by certiorari into this Court, and we might have remedied the defect in them by pronouncing judgment here. But this being a conviction under a particular act of parliament, which prescribes a particular punishment, we are of opinion that the proper course for this Court to adopt, is to cause an entry to be made, that inasmuch as it appears to the Court that no judgment has been pronounced by the Court below, therefore we order that the record be remitted to the Court below, in order that that Court may pronounce judgment therein.

An entry to this effect was accordingly made, and a procedendo awarded.

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On the last day of Term, *Jones* obtained a habeas corpus to bring up the prisoner from the hulks at *Woolwich*, in order to be discharged or bailed, and now the prisoner was brought up before three Judges sitting under the authority of 3 *Geo.* 4. c. 102. The return of the overseer of the hulks was read, which set out the judgment of the Court below, and stated, that the prisoner had been removed to the hulks by order of his majesty's secretary of state, and had been there detained in obedience to that order.

*Jones* then contended, that the return was insufficient, because it shewed no adequate authority or ground for the detention of the prisoner, and consequently, that he ought to be discharged. But,

BAYLEY, J. said, that as the Court sitting in banc, had ordered the Court below to proceed to give judgment, the question as to the legality of the prisoner's detention could not now be discussed.

*Jones* then moved that the prisoner be admitted to bail until the next Session.

*Littledale* opposed this, and contended that the Court had no authority to bail the prisoner; but,

PER CURIAM.—We are of opinion that the prisoner has a right to be discharged on producing sufficient bail (*a*). Our order is, that he be committed to the custody of the sheriff of the county of *Chester*, and constable of the castle of *Chester*, to be kept in safe custody until he shall give bail for his personal appearance at the next Session of *Chester*, then and there to receive the judgment of that Court for the offence of which he has been convicted.

(*a*) The security required was the prisoner's recognizance in 200*l.*, and four sureties in 25*l.* each.

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## *,* BAXTER and Others v. BLANSHARD.

*Friday, May 30.*

Prohibition does not lie to restrain the Admiralty from proceeding in a cause of possession for the restoration of a vessel to a person claiming as true owner, against one alleged to be a wrong doer.

A RULE nisi for a prohibition to the Admiralty was granted last Term, and now, on shewing cause, the case was this:—

In *July* last, a vessel called the *Partridge* arrived in the port of *London*, from *Bombay*, upon which a cause of possession was instituted in the Instance Court by Mr. *Blanshard*, a merchant of *London*, claiming the ship as sole registered owner thereof, whereupon a warrant by the Court was issued, and possession of the ship delivered to him upon giving bail to restore her on the usual terms. Mr. *Baxter*, a merchant, who had arrived in the vessel from *Bombay*, by his proctor, cited Mr. *Blanshard* to restore the possession to him, claiming the vessel on behalf of himself and two other persons resident at *Bombay*, as sole owners; and in support of the application, reference was had to certain attestations, and proofs exhibited for the purpose of proving the property. In answer to the monition, Mr. *Blanshard*, by his proctor, denied the allegation that Mr. *Baxter* and the other persons named were sole owners; that, on the contrary thereof, he, Mr. *Blanshard*, was the original sole registered owner; that he had sent the ship to the *East Indies*, under the command of one Captain *Beetham*; that the vessel, on her homeward voyage, having experienced some damage by stress of weather, was carried by the captain into *Bombay*, and there, without any necessity or any authority for that purpose, put up to sale by auction, and sold by the captain to Messrs. *Baxter & Co.*, who thereby possessed themselves of the vessel. This transaction was alleged to be mere contrivance, and that the sale took place without any just cause whatever. It was then prayed, that the bail which had been given by Mr. *Blanshard*, in order to obtain possession, might be exonerated, the claim disallowed, and *Baxter* condemned in costs. In this stage of the proceed-

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ings, the motion for a prohibition was made, and a rule nisi granted.

*Scarlett* and *F. Pollock*, now shewed cause, and contended that this was not a case for a prohibition, being merely a cause of possession. The affidavits shewed, that the party claiming the ship was sole registered owner, and finding her in the hands of a stranger, took the usual steps to obtain possession. There can be no doubt that the Court of Admiralty has jurisdiction in a cause merely of possession (*a*), and that for the wisest reason, because unless that Court has jurisdiction in rem, for the purpose of detaining a ship, until the question of right shall be decided, the greatest injustice might be done to the real owner. If a ship be in the possession of a wrong doer, what remedy is there to prevent his carrying her to a foreign country, out of the reach of the true owner, but in the Admiralty, for the purpose of compelling him to give security. This being merely a cause of possession, the Admiralty have jurisdiction over the ship in rem, until the question of title is decided. Whether that Court have authority to determine the right to the vessel, is another matter. At present, there is nothing before this Court to shew that the Admiralty have gone, or intend to go that length. It appears, however, from the proceedings, that this party has submitted to the jurisdiction of the Court by referring to certain attestations and proofs exhibited, for the purpose of shewing that he, and other persons are the owners. There is, therefore, nothing to prohibit, and as the Court have a right to entertain a cause of possession, this rule must be discharged. About three years since (*b*), this Court refused to grant even a

(*a*) See the *Peggy*, 4 Robinson A. R. 304, and several other cases in the Admiralty Reports.

*Feb.* 4.
Prohibition does not lie to restrain the Admiralty from proceeding in a suit between part owners, for possession of the ship's register.

(*b*) HILARY TERM, 1820. In that case, *F. Pollock* moved for a prohibition, to restrain the Instance Court from proceeding in a suit instituted by several part owners of a vessel against one, for the possession of the ship's register, which the latter held in character of ship's broker; and he insisted that the register being one of the ship's muniments, the right to which was in question, the Court of Admiralty had

rule to shew cause for a prohibition in a cause of possession, the Court being of opinion, that the right of possession was a matter peculiarly of Admiralty cognizance. In that case

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no jurisdiction. The vessel itself was then at sea, and à fortiori, the Court had no jurisdiction over the register. He had looked into the authorities, and found none which would sanction the jurisdiction which the Admiralty had assumed. This he believed to be the first attempt made in that Court to obtain possession of the register, in the case of a dispute between part owners.

Bayley, J. (*a*).—May not this be the only means of having the register placed in proper custody, namely, that of the Admiralty (*b*)? I apprehend that part owners have a remedy in the Court of Admiralty against each other, in order to prevent a vessel being sent to sea upon a voyage of which they do not approve. Suppose there are several part owners, one of whom having possession of the vessel, is desirous that she shall go upon a given voyage, against the wishes of the rest, I apprehend that those who are averse from the proceeding may institute a suit in the Court of Admiralty, in order to compel the opposite party to give security, that the vessel shall not go the voyage, and the Court may seize the vessel until the security shall be given. If so, it seems to me, that if one part owner has possession of the register, without which the ship cannot go to sea, and the other part owners shall desire the register to be placed in proper custody, they may institute a suit in the Court of Admiralty for that purpose. The majority of the ship owners may institute proceedings in the Court against the minority to require security, or that the register shall be delivered up. The Admiralty may have no jurisdiction to try a question of legal right to a ship, but here the right is not in question, because, suppose the applicant be the ship's broker, still, if he be a part owner, that character may be laid out of the question, and then he stands as one of several part owners. I am of opinion that this is matter for the cognizance of the Court of Admiralty.

Holroyd, J.—This is not a case for a prohibition, unless the right to the property is put in issue. Disputes between part owners about sending a vessel to sea, are matters of Admiralty jurisdiction, and so, I apprehend, are disputes respecting the possession of the register. Some ground should be laid to shew that the Court of Admiralty in this case intends to go farther, before we grant a prohibition.

Rule refused.

*Pollock* was desired to look for authorities, and mention the case again, if he should be so advised; but the application was not afterwards renewed. Eds. MSS. (*c*).

(*a*) *Abbott*, C. J. and *Best*, J. were absent.

(*b*) See the *Barbara*, 4 Rob. A. R. 1, and 2. *Abbott* on *Shipping*, 54.

(*c*) See *Anon.* 2 Chan. Ca. 36. *Trin.* Term, 32 *Car.* 2. *Boson* v. *Sandford*, Carth. 63. *Strelly* v. *Winston*, 1 Vern. 297. Skin. 230. *Horn* v. *Gilpin*, Amb. 255.

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there had been a proceeding in the Admiralty against one of several part owners to deliver up the ship's register, and the Court said, that that being a cause of possession, they would not grant a prohibition. It may not be competent to the Court of Admiralty to try the legal property in a ship, but they may take the possession quousque, leaving it to the parties to litigate the question of title at law or equity. It must be contended on the other side, that the Court of Admiralty have no right to interfere against a wrong-doer, who has by improper means obtained possession of a vessel; but that would be a monstrous proposition, for unless there be some means of detaining the vessel by a proceeding in rem, there would be a lamentable defect in the jurisprudence of the country. It is laid down as a first principle, by the writers on maritime law (a), that if part owners of a vessel cannot agree among themselves as to the mode of navigating a ship, the Court of Admiralty have jurisdiction over the possession until security shall be given to the satisfaction of the dissentient owners. A fortiori they have jurisdiction over the possession against the acts of a wrong doer. They cannot decide contracts made upon land; but suppose parties commit piracy or barratry, can it be doubted that the Admiralty have jurisdiction to lay hold of the vessel for the benefit of the right owners? This case comes within that principle, and therefore, a prohibition does not lie.

*J. Evans*, contrà, admitted he must go the length of contending, that even as against a wrong doer, the Instance Court has no jurisdiction over a vessel in rem, where the title is involved. No authorities have been cited on the other side, impugning this proposition. This is in fact, an attempt to try the right of property in the vessel in the Admiralty Court, which cannot properly be done, that question being peculiarly within the jurisdiction of the Courts

(a) See *Abbott* on *Shipping*, 4th edit. 91, et seq. and the authorities there cited.

of common law. In *Powell* v. *Robinson* (a), a prohibition was granted upon this principle, even before it was made clearly to appear that the Admiralty Court had not jurisdiction; and in an Anonymous case, in *March* (b), it was held, that a prohibition would go wherever the common law jurisdiction was infringed, though, "because there was some misdemeanor in the vendee, the Court would not award a prohibition" in that particular case. [*Bayley*, J. That was a libel against the vendor; here the subject-matter of the suit is the ship itself; the suit here is in rem, and the object of it is merely to prevent the removal of the ship out of the reach of *all* jurisdiction.] The transaction in which this suit originated did not occur at sea, and consequently upon that ground the Court below has no jurisdiction (c). The whole of this transaction occurred within a harbour, and by its very nature, raises a question of right of property in the vessel, which it is exclusively the privilege of a Court of common law to decide, and in which the Court of Admiralty cannot interfere. *Violet* v. *Blague* (d), *Velthasen* v. *Ormsley* (e), *Opy* v. *Child* (f), and *Child* v. *Sands* (g). Upon these authorities, it is clear that the rule for a prohibition in this case must be made absolute.

ABBOTT, C. J.—As far as we are informed of the proceedings in the Admiralty Court in this case, all we find is, that at the instance of Mr. *Blanshard*, (the sole registered owner,) a warrant issued to take possession of the ship, in order that it might be delivered to him. Having been taken possession of, by the officer of the Court, Mr. *Baxter*, by his proctor, prefers a claim to the Court, in which he alleges that he and other persons are the sole owners of the ship,

(a) Bunb. 9.
(b) March. 110.
(c) 4 Inst. 134. 13 *R*. 3. c. 3. and 2 *H*. 4. c. 11. Com. Dig. Admiralty F. 1. Hob. 78. 212.
(d) Cro. Jac. 514.
(e) 3 T. R. 315.
(f) 1 Salk. 31.
(g) Id. 32. 4 Mod. 179.

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and prays that it may be restored. That is the general allegation. Thereupon a monition issues to Mr. *Blanshard*, and in answer thereto, his proctor negatives the allegation, that Mr. *Baxter*, and the other persons named, are the sole owners of the ship; that on the contrary, the vessel was his own, and that he had sent her to the *East Indies*, under the command of Captain *Beetham*; that the vessel met with some disaster on her voyage home; that the Captain put into *Bombay*, and there without any necessity, and without any authority, but of his own mere motion, put up the vessel to auction, and sold her to *Baxter & Co.*, who possessed themselves of her under that sale. All this is alleged to be mere contrivance, and without any foundation in necessity, and then he prays that the bail which had been given, in order to have the possession delivered to *Blanshard* may be exonerated, the claim disallowed, and *Baxter* condemned in costs. Nothing further appears to have been done. We cannot conjecture what judgment the Court would have pronounced, even in that case, much less can we say what course it would have adopted, if the proctor for Mr. *Baxter* had been allowed to exhibit his articles, alleging a title to the ship; and if this case falls under circumstances in which he might by law claim the property in the vessel, we cannot assume that the Court of Admiralty would proceed to try the question. If therefore we are to grant a prohibition in this case, it must be on the single ground, (and the question has been fairly met by Mr. *Evans*) that the Court of Admiralty has no authority or jurisdiction to take the ship out of the possession of a mere wrong doer, and deliver it back to the right owner. We must decide that, if we grant a prohibition, and if we were to do so, we should, to my certain knowledge, overturn a practice and interrupt a well known proceeding which has long prevailed in the Instance Court. I do not know that there has been in modern times, any decision in this Court upon the precise subject; I know that some time in the reign of

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*Geo.* 1. (*a*). the jurisdiction of the Admiralty upon another point, underwent great consideration, and since then there has been more than one decision of this Court, recognizing the authority and jurisdiction of the Admiralty, particularly as to disputes between the owners of vessels (*b*). The question is, whether we are now to recognize a jurisdiction which has been so long acknowledged. The case now before the Court is a mere case of possession, the owner of the vessel claiming possession against a wrong doer, who has as yet, set up no special title, nor adduced any thing to enable us to say that this is not a case within the jurisdiction of the Admiralty. I should pause very much before I thought myself at liberty to interpose against a practice which I have known to have prevailed so long, even if I could not well see the good sense and propriety of it. But it is impossible for any person not to see, that if this proceeding, which is in rem, and the only one known to the law of *England* in all its branches, by which the possession of the thing itself can be taken out of the custody of a wrong doer, and put into that of the rightful owner, were not allowed, the law would be deficient in not affording a remedy, in a case where the most grevious injury might be committed. Unless a proceeding in rem were allowed, all the remedy which a party would have, would be to proceed against the person of the wrong doer, who might be unable to pay the value of the ship, and might in the mean time send it into foreign parts. This proceeding in rem, I think a most useful part of the general jurisprudence of the country. I know it has been practised, and not seeing any special ground in this case, to distinguish it from the general rule on which the Court is to act, or any thing to shew that the Court of Admiralty are proceeding to determine a question which it is not competent for them to try, I am of opinion that

(*a*) See *Barnardiston* v. *Chapman and another*, 1 Geo. 1. Sir *Peter King's Cases*, M. S. 4 East, 121.

(*b*) See *Lambert* v. *Aeretre*, 1 Ld. Raym. 223. *Blacket* v. *Ansley*, Id. 235. *More* v. *Rowbotham*, 6 Mod. 162. *Dimmock* v. *Chandler*, 2 Stra. 890. Fitzg. 197. *Oaston* v. *Hebden*, 1 Wils. 101.

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this rule ought to be discharged. I do not say whether they may or may not try the question of right.

BAYLEY, J.—I am of the same opinion. If the Court of Admiralty shall proceed hereafter to an extent beyond its jurisdiction, that may be ground for a prohibition.

HOLROYD, J., concurred (a).

Rule discharged.

(a) *Best*, J. was absent.



*Monday, June 2.*

## BRISTOW and Others v. BINNS.

An award against trustees and guardians of an infant, tenant for life of the realty, who died before the award was made, is not binding.

ON shewing cause against a rule for setting aside an award made concerning the repair of a weir upon a mill stream, it appeared that two of the plaintiffs were trustees and guardians under a will, for an infant, who was tenant for life of the property on which the weir was erected. Before the award was made, the infant died, and the award being made against two of the plaintiffs in their character of trustees, the question was, whether as to them, it was binding.

THE COURT held that it was not, and ordered it to be set aside, as far as related to the trustees.

Rule absolute.

*F. Pollock* for the plaintiffs, and *Littledale* for the defendant.

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## Cheek v. Jefferies.

Monday, June 2.

Where the memorial of an annuity-deed described one of the subscribing witnesses to the warrant of attorney, by the initial of his christian name, instead of setting it out at length: Held not a compliance with 53 *Geo.* 3. c. 141. s. 2, and the warrant of attorney set aside.

*MARRYATT*, last Term, obtained a rule to shew cause why the warrant of attorney given in this case for securing the payment of an annuity, and the judgment, and all proceedings thereon, should not be set aside, on the ground that the memorial did not contain the christian name of one of the subscribing witnesses to the warrant of attorney, set out at full length, as required by 53 *Geo.* 3. c. 141. s. 2. the name being set out with the initial only, viz. "*H. Fleming,*" his name in fact being "*Harris Fleming.*"

*Denman,* C. S., now shewed cause, and contended that the name was sufficiently set out in compliance with 53 *Geo.* 3. which did not in terms require the names of the witnesses to be written at full length in the memorial. There was a difference between that statute and 17 *Geo.* 3. c. 26, in section 3d of which, there was an express provision that the names of the parties to the deed, "shall be fully and truly set forth and described in words at length" *in the deed*; which provision is omitted in 53 *Geo.* 3. even with respect to the deed itself; and neither of those statutes directs the names of the witnesses to be set out at length *in the memorial.* It could hardly be supposed, that greater nicety and particularity would be required in the memorial than in the deed itself, and as the latter statute was intended to remedy the defects of the former, it must be inferred that the Legislature, by omitting this provision, meant to dispense with the formality. All that the statute requires is "a memorial of the names of the witnesses, in the form, or to the effect following;" and then follows a schedule under the title of "Witnesses," in which are the letters "*E. F.*" The signature, therefore, of "*H. Fleming,*" is a sufficient compliance with that requisition.

*Marryatt,* contrà, was stopped by the Court.

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Abbott, C. J.—The statute prescribes that the *names* of all the witnesses shall be set out in the memorial. We cannot say that the initial of a name is a name, or that "*H.*" is a proper or intelligible description of the name of "*Harris.*" The letter "*H.*" expresses nothing definite; it may stand for *Harris* or *Henry*, or any other christian name of which that letter is the initial; and therefore I cannot say that it satisfies the requisites of the statute, one of which clearly is, that *all* the names of the witnesses shall be set out, with such certainty that they may be found, if they are required, to give evidence of the due execution of the instruments. The object of this rule is only to set aside the warrant of attorney, and to that extent it must be made absolute; but it should be understood, that no action is to be brought.

Bayley, J. concurred, and said, it was quite clear that the initial was an insufficient description in the memorial, because it would be insufficient in a subpœna; if Mr. *Fleming* had been subpœnaed to give evidence respecting the annuity, by the name of "*H. Fleming*," he could not have been attached for disobedience to the writ.

Rule absolute (*a*).

(*a*) Vide *Smith* v. *Pritchard*, ante, vol. i. p. 374, and the cases there cited.



*Tuesday, June 3.*

## Doe, d. Higginbotham *v.* Hobson.

A deed of conveyance, which omits truly to set out the whole consideration directly or indirectly paid, or agreed to be paid for the estate conveyed, is not void by 48 *Geo.* 3. c. 149. s. 22; therefore in ejectment for a forfeiture, where a lease was supposed to have omitted part of the consideration:—Held, that this was no answer to the action.

EJECTMENT for a house and premises called the *Petersburgh Hotel*, with the appurtenances. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after last Term, it appeared that the premises in question had been

demised by lease for ninety-nine years, from the lessor of the plaintiff to the defendant. The ground of action was forfeiture of the lease, by breach of covenant. The lease, dated 2d *October*, 1820, stated no further consideration than the usual covenants to repair, &c. On the same day it was executed, a warrant of attorney was given by the defendant to the lessor of the plaintiffs for 3000*l*. It was submitted on the part of the defendant, that the 3000*l*. mentioned in the warrant of attorney, was indirectly the consideration for the purchase of the lease, and therefore ought, by virtue of 48 *Geo.* 3. c. 149. s 29, to be set out in the lease, and having been omitted, the lease was void. The learned Judge, however, left it to the Jury to determine whether the 3000*l*. was the consideration for the lease, or for the good-will of the house. The Jury found, that it was for the good-will and not for the lease, and therefore a verdict was entered for the plaintiff.

*Campbell* now moved for a new trial, and contended, that the lease was void by the statute, inasmuch as the 3000*l*. mentioned in the warrant of attorney, was indirectly the consideration for granting the lease. By 48 *Geo.* 3. c. 149. s. 22, it is declared, that in cases of the sale of any interest in any tenements or other property, where a duty is imposed on the conveyance thereof, in proportion to the amount of the purchase or consideration-money therein expressed, the full purchase or consideration-money which shall be directly *or indirectly* paid or secured, or agreed to be paid for the same, shall be truly expressed and set forth in words at length in the deed or instrument, whereby the thing sold shall be conveyed. Therefore if this sum of 3000*l*. was directly or indirectly the true consideration for the lease, it should have been set forth at length in the lease. It was true that the Jury had found the consideration in the warrant of attorney was for the good-will of the house, but there could be no reasonable doubt that it was indirectly the consideration for granting the lease, and the execution of the

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warrant of attorney was a mere expedient to evade the ad valorem duty. The case, therefore, ought to be submitted to another trial.

Abbott, C. J.—I left it to the Jury to determine, whether the 3000*l.* was the consideration for the lease, or the consideration for the good-will of the trade; they found it was the latter, and I think their finding concludes the question. Suppose a man buys an estate for 1000 guineas, and the sum put into the deed is 1000*l.*, are we to say that the conveyance would be void because the sum of 1000 guineas was not inserted.

Holroyd, J. (*a*).—Even supposing the 3000*l.* to be the consideration for the lease, still the statute does not make the instrument itself void. It directs that the consideration-money shall be truly expressed, but it does not say that if it is not expressed, the conveyance shall be void; on the contrary, it seems studiously to guard against that consequence; for all it says, is "that in case the consideration-money shall not be truly expressed and set forth in the manner hereby directed, the purchaser, and also the seller, shall forfeit the sum of 50*l.* and shall also be charged with five times the amount of the excess of duty which would have been payable for the instrument in respect of the full consideration-money, in case the same had been truly expressed, beyond the amount of the duty actually paid." In any event, therefore, the deed is not avoided by the omission, but only subjects the parties to the penalties mentioned; and therefore this verdict cannot be disturbed.

Best, J. concurred.

Rule refused.

(*a*) *Bayley*, J was absent.

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Tuesday, 3d June.

## England v. Lewis.

Where a defendant was arrested in the Mayor's Court of *Hereford*, and by the practice of that Court, a plaintiff is not bound to deliver a declaration without a rule to shew cause for that purpose, and the defendant, without conforming to the practice, superseded the action for want of a declaration, and was again arrested in *London* for the same cause of action, the Court discharged him on filing common bail.

On shewing cause against a rule for discharging defendant out of custody on filing common bail, the case was, that he had been arrested in the Mayor's Court of the city of *Hereford*. He superseded the action in that Court for want of a declaration, and was discharged. Being arrested again in *London*, he now sought to be discharged, on the ground that he could not be arrested twice for the same cause of action.

*Russell*, for the plaintiff, admitted the general principle, that a defendant could not be arrested twice for the same cause of action, but that rule, he contended, was subject to the exception, that where the party had procured his discharge in the first instance by improper conduct, the Court would not relieve him. Now in this instance, he had an affidavit, that by the practice of the Mayor's Court in *Hereford*, a plaintiff was not bound to deliver a declaration to a defendant without a rule to shew cause for that purpose. The defendant here had neither served or obtained a rule for a declaration, and therefore he had been superseded irregularly, and consequently was entitled to no relief.

Per Curiam.—We cannot enter into the irregularity of the defendant's proceedings below. We must consider the suit in the Mayor's Court as properly ended; and therefore the plaintiff had no right to arrest him a second time.

Rule absolute.

*Justice* was to have argued in support of the rule.

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*Tuesday, June 3.*

JAMES *v.* CATHERWOOD.

The Courts of this country will take no notice of the revenue laws of foreign states. Therefore where assumpsit was brought for money lent in *France*, and unstamped receipts were produced in proof of the loan, evidence to shew that by the law of *France*, such receipts required stamps to render them valid, was rejected.

ASSUMPSIT for money lent. Plea, first, non-assumpsit, and second, the statute of Limitations. At the trial before *Abbott*, C. J., at the Second *Middlesex* Sittings, in *Easter* Term, it appeared that the money in question was lent by plaintiff to defendant in *France*, in the year 1814, where both parties then resided. To prove the loan, receipts for the money, dated in the year 1817, and signed by the defendant, but not stamped, were tendered in evidence. The defendant's counsel objected to those receipts as inadmissible, and offered to shew, that by the law of *France*, such receipts required a stamp; but the learned Judge being of opinion that they were admissible here, as acknowledgments of the debt, without any stamp, rejected that evidence, and the plaintiff had a verdict.

*Chitty* now moved for a new trial, on the ground that the defendant should have been allowed to produce evidence of the law of *France*, to shew that in that country such receipts were not legal without a stamp, and contended, that as every contract must be entered into in conformity with the lex loci, it was competent to the defendant to shew that this contract had not so been entered into. (*Best*, J. Can we take notice of the revenue laws of *France*? *Abbott*, C. J.—That is the question. In the time of Lord *Hardwicke*, it became a maxim, that the Courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous to them, when they do not give effect to ours?) There certainly was a dictum of Lord *Hardwicke*, that an *English* Court cannot take notice of the revenue laws of a foreign country, but here was no solemn decision upon that point; which seems

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rather to have been taken for granted, than grounded on any authority. It is admitted by foreign writers, and others, that though an instrument made in a foreign country, may not be admissible in evidence, yet it does not make it void; but that if any use is to be made of it, evidence must be adduced to shew that it has been framed according to the lex loci. Upon this principle it is a matter worthy of further consideration, whether it was not competent to the defendant to shew, that by the law of *France*, these receipts would not be binding in that country unless stamped.

ABBOTT, C. J.—This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord *Hardwicke*, that in a *British* Court we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence, what the law of that country was, in order to ascertain whether the instrument was or was not valid. Nothing must be taken by the motion.

HOLROYD, J. (*a*), and BEST, J. concurred.

Rule refused (*b*).

(*a*) *Bayley*, J. was absent.

(*b*) Vide *Holman* v. *Johnson*, Cowp. 343, where Lord *Mansfield*, C. J. says, " no country takes notice of the revenue laws of another." *Alves* v. *Johnson*, 7 T. R. 243, which was an action upon a promissory note made in *Jamaica*, where Lord *Kenyon* says, " I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a Court of Law here. *Clegg* v. *Levi*, 3 Campb. 166. *Inglis* v. *Usherwood*, 1 East, 515. *Bothlingk* v. *Inglis*, 3 East, 381. *Rex* v. *Picton*, 30 Howel's State Trials, 514. et seq. *Lacon* v. *Higgins*, Dowl. & Ryls. 1 N. P. C. 38. and *Brown* v. *Gracey*, Id. 41.

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*Tuesday, June 3.*

SARGUY and Another *v.* HOBSON.

Where a vessel was driven by tempestuous weather, into a foreign port, and in order to defray the expences of repairing, (without which she could not proceed on her voyage), the captain was obliged to sell part of the cargo:—Held, that the underwriters were not liable for a total loss by perils of the sea.

ASSUMPSIT on a policy of insurance on goods. The declaration averred a total loss by perils of the sea. A verdict was found for the plaintiff at the *London* adjourned Sittings after *Easter* Term, subject to the opinion of the Court on the following case:—

On the 12th *May*, 1817, the plaintiffs effected a policy of insurance on *West India* produce, on the ship *Pekin*, at and from *Jacmel*, to the ship's port of discharge in *Europe*, without the *Mediterranean* and *Baltic*, with liberty to take in produce in the two contiguous ports of *Acquin* and *Aux Cayes*, and to proceed to *St. Jago* in the Island of *Cuba*, to finish her loading, and wait at or off any port in the channel, for orders or otherwise. On 30th *May*, 1817, the vessel was in safety in the Island of *Cuba*, and was there laden by the plaintiffs with *West India* produce, and thence set sail to her port of discharge in *Europe*. In the course of her voyage, she was overtaken by a tempest and sprung a leak, and made so much water that it became necessary, for the preservation of the ship and cargo, to make for the nearest port, which turned out to be the *Havannah*, to which the master, after consultation with the crew, proceeded. On her arrival there, it became necessary, for the purpose of ascertaining the cause of her leaking, to discharge the cargo, which was done accordingly, and surveys of the ship having been held, it was found expedient to remove the copper sheathing, in order to get at the back, which was done, and the ship was repaired, new caulked, and re-fitted for sea. Without these repairs, she could not have proceeded on her voyage. The master not having any other means of defraying the expences of the repairs, sold part of the cargo for that purpose, and the ship then proceeded or her voyage, and arrived in safety in her port of discharge in *Europe*, where the remainder of her cargo was duly delivered. The defendant paid, in respect

of his subscription of the policy, as for a general average loss on the goods insured.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover as for a total loss of the goods sold. If the Court should be of opinion in the affirmative, the verdict to stand; if otherwise, a verdict to be entered for the defendant, with liberty to either party to turn it into a special verdict.

*F. Pollock*, for the plaintiff. The question in this case is, whether, under all the circumstances, this is a total, or an average loss, and the object of presenting it to the Court in the present shape, is to obtain a review of the decision in *Powell* v. *Gudgeon* (*a*). The point certainly depends upon whether the loss, either total, or average, was occasioned by the perils of the sea, so as to justify a claim on the underwriters. If the plaintiff had been made acquainted with the injury the vessel had received at the time when she was actually in distress, and consequently disabled from performing her voyage, it is quite clear that he would then have been entitled to abandon. The doctrine of abandonment has been considerably narrowed by some recent decisions, but not so far as to deprive the assured of the benefit of it under the circumstances of such a case as this. It has always been held, that pressing danger will justify abandonment, and that the immediate prospect of a total loss, is in effect a total loss for that purpose. In the present case, there was pressing danger, and a prospect of loss, and damage actually ensued; and therefore it seems to be within the rule. In the result, indeed, the goods were placed in a state of security, and that fact is communicated to the assured; but where was the place of security? At a great distance, and wholly beyond his reach; and it was perfectly useless therefore to tell him that the goods were safe, unless it could also be shewn that they were within his reach, and that he might ultimately obtain pos-

(*a*) 5 M. & S. 431.

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session of them without any increase of risk, trouble, or expence. This has been repeatedly held to be the rule, with respect to the ship, and on what principle can a different rule be propounded with reference to the cargo? The effect upon the plaintiff here, was precisely that of a total loss. If he had abandoned at the time when the ship and cargo were in this situation, as he might legally have done, but which from the very circumstances of the case, being at a distance, he was unable to do, it is clear the defendant would have been liable upon the policy; and what difference can the omitting to abandon make? The goods do not reach him; they are to him lost and annihilated, and as that loss was occasioned by the perils of the sea, it is but just and reasonable that he should have the same claim against the underwriters, as he would have had if he had abandoned, or if the cargo had actually perished. [*Bayley*, J. Suppose that to have been so, who would have been liable for the expence of repairing the ship?] The cargo itself would have been liable for the repairs, and the captain had a right to sell or hypothecate a portion of it sufficient to raise the sum required; that was decided in the case of the *Gratitudine* (*a*), and the rule is, that the captain always has that right, where the exercise of it is necessary for the preservation of the ship and cargo. Here the ship and cargo had, from the perils of the sea, become in a state which rendered it impossible they should reach their place of destination without a repair of the ship; if no repair took place, the result was a total loss of all the goods, because all were prevented from reaching the assured; if part were sold in order to preserve the rest, then there was a loss still in respect of that part.

*Campbell*, contrà, was stopped.

THE COURT, adhering to the authority of *Powell* v. *Gudgeon*, were of opinion that this was not a total loss, and

(*a*) 3 Rob. Adm. Rep. 240.

certainly not a loss arising from perils of the sea, and therefore gave judgment for the plaintiffs, leaving it to the defendant to have a special verdict if he thought proper.

Judgment for the defendant (*a*).

(*a*) Vide 5 M. & S. 47, and ante, vol. i. p. 234.

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SCRACE, Gent. one, &c. *v.* WHITTINGTON, Gent. one, &c.

*Tuesday, June 3.*

An attorney employing an agent to do business for his client, is primarily liable to the agent for his bill, though the latter knows the business to be done for the client; but to whom the credit is given is a question for the Jury.

ASSUMPSIT for an attorney's bill. Plea, non-assumpsit. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings, after *Easter* Term, it appeared that plaintiff and defendant were both attornies, the former residing at *Bath*, and the latter in *Gloucestershire*. Plaintiff was solicitor to a commission of bankrupt, which had been sued out against one *Budgen*, and defendant was solicitor of a Miss *Smallcombe*, mortgagee in possession of certain landed estates belonging to the bankrupt. It becoming necessary that these estates should be sold, defendant, by direction of his client, Miss *Smallcombe*, wrote to plaintiff, commissioning him to effect sale of the property, which he endeavoured to do, but ultimately the sale did not take place, and for his trouble, this action was brought. Plaintiff knew that Miss *Smallcombe* was mortgagee, and that defendant was employed as her agent, but he made out his bill in the first instance, to the defendant personally, and afterwards delivered a bill to Miss *Smallcombe*. A letter from the plaintiff to the defendant was read in evidence, from which it appeared that the former knew that Miss *Smallcombe* was mortagee, and there was no evidence of any personal undertaking by the defendant, to pay the amount of the plaintiff's bill, nor of any privity between the plaintiff and Miss *Smallcombe*. Upon this evidence, the case was left to the Jury, with directions to them to consider who had em-

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Scrace v. Whittington.

ployed the plaintiff, and to whom he was giving credit; and if they should be of opinion that defendant was the person, to find for the plaintiff. The Jury found for the plaintiff.

*Campbell* now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, on the ground that the learned Judge had left that to the Jury as a question of fact, which he ought himself to have decided as a question of law, namely, which of the parties had rendered himself liable for the plaintiff's bill, the defendant, or his principal, the mortgagee. It is quite clear that the defendant was a mere agent in the whole transaction, and although an agent may, by certain acts of his own, render himself liable instead of his principal, it is not competent to a third person to do so, nor to transfer his original claim upon the principal, and fix it upon the agent. The only question in the cause was, who, under the circumstances, was by law liable to pay this bill, and it is clear that the principal was liable, unless the defendant by any personal undertaking or any other act of his own, had taken upon himself the responsibility of his client, which he certainly never did. He cited *Burrell* v. *Jones* (*a*), and *Iveson* v. *Conington* (*b*).

Abbott, C. J.—I told the Jury at the trial, that the general rule in cases of this nature was, that a creditor should look to the principal and not to the agent, for the payment of his debt, but that there were some exceptions to that rule, and I left it to them to consider who was the person that gave the order, and to whom the plaintiff gave credit. They were of opinion that the defendant gave the order, and that the plaintiff, from the first, looked to him as his employer; I was satisfied with their decision at the time, and I cannot say that I see any reason to be dissatisfied with it now.

(*a*) 3 B. & A. 47. (*b*) Ante, vol. i. p. 307.

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BAYLEY, J.—It is quite clear from the evidence, that the defendant was the person who authorised the plaintiff to act, and that the plaintiff had no personal communication with the mortgagee. I am therefore of opinion that this case was properly left to the Jury, and that they have found a right verdict. An agent may bind himself even in cases where the principal is known; and I believe among attornies, the usual practice is, where business is done by one for another, for the one to look to the other for payment, without any reference to the client, of whom, in general, the agent knows nothing. If the defendant intended to deviate from this practice, and to render his client alone responsible, he should have communicated that intention to the plaintiff when he first retained him to act; for otherwise the plaintiff would naturally look to him, and to him only, for the payment of his bill. The retainer came exclusively from himself, and to all appearance was given in the ordinary course, and upon his own account. He is therefore primarily liable.

HOLROYD, J.—An attorney is not to be considered in the mere light of a servant or agent to the same degree that other general agents are. In this case, if the defendant had any doubt whether the plaintiff considered himself as acting for him, or for the mortgagee, he was bound to inquire into the fact, and to set the plaintiff right if he was proceeding under any mistaken notion on that subject.

BEST, J.—This was entirely a question of fact, to whom did the plaintiff give credit, and the Jury have decided it correctly. The credit was undoubtedly given to the attorney, for the name of the client was not mentioned when the order to do the business was given. He could not possibly expect therefore to look to her for payment.

Rule refused.

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*Tuesday, June 3.*

## Upston *v.* Marshall.

A bill of exchange drawn on 21st *December*, at two months, for 30*l.* on a two-shilling stamp, and altered on the same day, before acceptance, to 31st *December*, does not require a half crown stamp within 55 *Geo.* 3. c. 184.

ASSUMPSIT on a bill of exchange for 30*l.* by the indorsee against the acceptor. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after last Term, it appeared, that the bill in question was originally drawn on the 21st *December*, 1822, payable two months after date, upon a two-shilling stamp. When it was presented for acceptance, the defendant desired it might be drawn at three months. To this the drawer objected, but it was agreed between them, that the date should be altered from the 21st to the 31st *December*, so that it should not begin to run until ten days after the bill was in fact accepted, but still, on the face of the instrument, it appeared to be payable two months after date. It was objected for the defendant, that the stamp was insufficient, and therefore the plaintiff must be nonsuited. By 55 *Geo.* 3. c. 184, Schedule, Part 1, title "Inland Bill of Exchange," every bill exceeding 20*l.* and not exceeding 30*l.* drawn at a date exceeding two months after date or sixty days after sight, was made liable to a stamp of two shillings and sixpence; and though this bill appeared upon the face of it to be accepted at a date requiring a two-shilling stamp, yet as by the alteration it had in fact been made to bear a date requiring the larger stamp, it was clearly within the spirit of the act. The learned Judge however, over-ruled the objection, and the plaintiff had a verdict.

*Marryatt* now moved to enter a nonsuit for the same objection. He admitted that the bill, *upon the face of it*, was payable at two months after date, and was so far properly stamped with a two-shilling stamp; but he contended, that as the date had been altered at the time when it was accepted, from which time it had in fact two months and ten days to run, a larger stamp became necessary, and therefore no action could be maintained upon it.

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UPSTON v. MARSHALL.

ABBOTT, C. J.—We are to put such a construction upon the stamp acts, as shall have the effect of preventing frauds upon the revenue; but at the same time we are not, by guarding against the possible loss of sixpence to the Exchequer, to put such a construction upon this act as will enable one class of his Majesty's subjects to defraud another. We are to look to the date of the bill, and to attend to the time when, upon the face of it, it is to take effect as a security for money. Looking at this bill, it appears upon the face of it, to have the proper stamp directed in the schedule. If this be a fraud, it is in the power of the legislature to prevent it, by imposing penalties upon offenders; but the mischief to commerce would be incalculable if we were to hold, that a bill should become utterly null and void in the hands of a bonâ fide holder, because after it was drawn, and before acceptance, the date was altered by putting it forward.

HOLROYD, J. (a)—This objection, if it were to prevail, would amount to a forfeiture of the money mentioned in the bill, and would affect third persons with whom the bill was negociated, which would be extremely unjust as against persons perhaps ignorant of the transaction. We are bound to look to the day of the date of the instrument itself, and as it appears that this bill does not exceed two months from the date, it has the proper stamp required by law.

BEST, J. concurred.

Rule refused.

(a) *Bayley*, J. was absent.

1823.

*Wednesday, June 4.*

ATKINS and Another, Executors of JOHN ATKINS, deceased, *v.* H. TREDGOLD, R. TREDGOLD, J. RALFE, and J. KNIGHT, Executors of JOHN TREDGOLD, deceased.

*A.* and *B.* make a joint and several promissory note, and after the lapse of six years *A.* dies, leaving *B.* one of his executors; and *B.* subsequently pays interest on the note, not in his executorial character, but personally as a maker of the note:—Held, in an action by the executors of the payee of the note, against *A.*'s executors, alleging, first, a promise by the testator in his life-time, and second, a promise by the executors after his death,—that the payment within six years, of interest by *B.* (who suffered judgment by default) was not sufficient to take the case out of the statute of limitations as against the executors.

ASSUMPSIT on three joint and several promissory notes, made by the testator *John Tredgold*, and his son, the defendant, *Robert Tredgold*. The first and second note were respectively dated the 17th *January*, 1806, one for 300*l.* and the other for 200*l.* payable on demand, with interest; and the third, was dated 17th *January*, 1809, for 300*l.*, payable in like manner. The declaration contained ten counts. The first three were upon the three notes respectively, averring a promise by the testator *John Tredgold*, in his life-time; the next four were money counts, averring a like promise by the testator; the eighth was on an account stated, with the testator, and averring a breach by him in his life-time, and by his executors since his death; the ninth was on the first note, averring a promise to the plaintiffs' testator, by the defendants, as executors; and the last was on an account stated by the defendants, with *John Atkins*. The defendant *Robert Tredgold* suffered judgment by default; the defendant, *Knight*, pleaded to the first eight counts; first, non assumpsit, by the testator *John Tredgold*, and second, actio non accrevit infra sex annos, to the testator *John Atkins*; to the ninth and tenth counts, first, a plea of non assumpserunt by the defendants generally; and second, non assumpserunt infra sex annos; and to these were added, pleas of ne unques executor, and of nulla bona. The other two defendants pleaded similar pleas, but omitting the last two. Replications took issue on all the pleas. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last *Trinity* Term, after the usual evidence of hand-writing, it was proved, that the testator *John Tredgold* died in 1810, being more than six years before action brought, but that in the year 1816, *Robert Tredgold* his son paid one year's

interest then due on all the notes. There was no evidence of any promise by the defendants to the plaintiff's testator, in their character of executors, nor was there any evidence to shew that the defendant *Knight* had ever acted as executor, although he was named one of the executors of *John Tredgold's* will. On this evidence it was contended, that there was no case against the defendants, to take the case out of the statute of Limitations, and the Jury, under the directions of the learned Judge, found their verdict for the defendants.

In *Michaelmas* Term last, *Gurney* obtained a rule nisi for a new trial, and now on shewing cause,

THE COURT asked the plaintiff's counsel whether they could distinguish this case in principle from *Pittam* v. *Foster* (*a*).

*Gurney* and *Selwyn* in support of the rule, contended, that *Pittam* v. *Foster*, though in some degree applicable, went too far, and would on examination be found to undermine the principle on which it assumed to rest. The effect of that decision is, that a new promise after the statute of Limitations has run, creates *a new cause of action*. The operation of the statute, however, is not to extinguish the original demand; it only suspends the remedy, or operates as presumptive payment. If a fresh promise is to operate as a new cause of action, then it would be necessary to found the declaration on that new promise; but the course of pleading hitherto adopted would not warrant that practice. Where the statute of Limitations is pleaded, the only question is whether the statute has been waived by a new promise after six years. Here *Robert Tredgold* has waived the statute by paying interest on the notes, and *Whitcomb* v. *Whiting* (*b*), is an express authority to shew that the acknowledgment of one of the makers of a joint and several promissory note, takes the case out of the statute as against

(*a*) Ante, vol. ii. 363. (*b*) Doug. 651.

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the others, and may be given in evidence in a several action against any of the others. These notes are joint and separate, and the promise by *Robert* becomes the promise of *John Tredgold* the testator. Here there is a joint duty, and *Cheetham* v. *Ward* (*a*) decides, that there is no difference in this respect between a bond and a promissory note, the payment by one being payment by all. The question then is, whether the promise of *Robert*, which would be binding on *John Tredgold*, if he were alive, has the effect of rendering his executors liable without any express promise on their part. They are clearly liable in this way:—The effect of the subsequent promise by *Robert Tredgold*, is to revive the debt, and when once revived, it revives with it all its original obligations, and takes effect from the time of its first creation. Here the promise upon which the plaintiff relies, is taken out of the original debt, and it was necessary to allege the promise to the plaintiff's testator. [*Abbott*, C. J. But surely you must shew that *John Tredgold* has promised within six years.] The effect of *Robert Tredgold*'s promise, is to revive the debt, and when once revived, all the liabilities to pay, attach upon the makers or their executors. Here there is an implied contract growing out of an original contract. When once there is a debt shewn to be due from the testator, the law implies a promise from his executors. [*Bayley*, J.—But you imply the debt to be due, not from *John Tredgold*, but from his executors. It must be due from his executors if at all.] When once the debt is revived, it stands as an original uncancelled, unextinguished debt of the testator, and consequently binding on his executors. They distinguished this case from *Deane* v. *Crane* (*b*), *Sarrell* v. *Wine* (*c*), and *Ward* v. *Hunter* (*d*), because here there was a person in a condition to promise, and therefore the case was within the doctrine of *Whitcomb* v. *Whiting*, and they relied upon *Yea* v. *Fouraker* (*e*), and *Leaper* v. *Tatton* (*f*).

(*a*) 1 Bos. & Pul. 630.

(*b*) 1 Salk. 28. 6 Mod. 309. See *Hyeling* v. *Hastings*, 1 Ld. Raym. 389. and *Hickman* v. *Walker*, Willes, 29.

(*c*) 6 Taunt. 216.

(*d*) 3 East, 409.

(*e*) 2 Burr. 1099.

(*f*) 16 East, 420.

[*E. Lawes*, who was counsel alone for the defendant *Knight*, suggested that there was another difficulty with respect to the state of the record which had not been adverted to, namely, that the record averred a promise by *all* the defendants as executors of *John Tredgold*, whereas it distinctly appeared in evidence that *Knight* never was an executor. This was intended to be taken as a preliminary objection to prevent others arising.] It is true that *Knight* pleaded ne unques executor, but the plaintiffs reply that he was executor, and the testator's will was produced in which he was named as an executor, and that is primâ facie evidence that he is sued in the proper character. [*Bayley*, J. Does the will alone make him executor, unless you shew that he acts and takes upon himself the administration?] In answer to this, *Wentworth's Executor*, c. 15. p. 184, was cited.

*Copley*, S. G., (with whom was *Scarlett*), contrà, for the defendants *H. Tredgold* and *Ralfe*, confined himself to the question arising on the Statute of Limitations; and after citing *Brandram* v. *Wharton* (a), he was stopped by the Court.

*E. Lawes*, for the defendant *Knight*, was also stopped.

ABBOTT, C. J.—The plaintiffs have declared in several counts on three promissory notes, alleged to have been made by *John Tredgold* in his life-time, and in another count in the usual form, that *John Tredgold* in his life-time promised to pay the same notes. To that part of the declaration there is a plea that *John Tredgold* never promised to pay within six years. It appears in fact, that he had been dead greatly more than six years before the action was commenced. It is clear, therefore, that no promise could have been made by him to support this action, and consequently those counts must be put out of the question. Then another count upon which the plaintiffs rely, alleges in substance,

(a) 1 B. & A. 463.

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that *John Tredgold* in his life-time had made these promissory notes, whereby he became liable to pay to *John Atkins*, whose representatives the plaintiffs are, certain sums of money; that he died leaving those sums unpaid; that the defendants, as his executors, had knowledge of that fact, and in consideration thereof, promised to pay. The question is, whether there has been evidence given in this case of a promise by the executors, qua executors. Now I cannot accede to the argument, that the mere existence of a debt owing by a testator, is of itself evidence of a promise by the executor to pay it. We must therefore seek for evidence elsewhere of a promise by the executors. I, however, can find none. The only evidence is, that *Robert Tredgold*, who is one of the defendants and one of the executors, and who was himself a joint maker, did, in the year 1816, pay a year's interest on the notes. The Jury found that he paid the interest not as executor, but in his own right;—that fact was proved in evidence. Then, as there is nothing to bind the defendants in the character of executors, I own I should feel great difficulty in saying, independently of the Statute of Limitations, that the plaintiffs had made out their case. But the defendants further plead, that they did not promise within six years, and going back to what I originally said, if reliance is placed upon the existence of the debt at the death of the testator, as evidence of a promise by the executors, still the Statute of Limitations is a valid defence, the testator having died ten years since. The question then is, whether the payment by *Robert Tredgold* of interest upon the notes in his own right, and not as executor, affords evidence of a promise binding on his co-executors. I think it does not afford evidence of a promise by them to pay at any time, but at all events, I am quite clear it does not take the case out of the Statute of Limitations. The case of *Whitcomb* v. *Whiting* (*a*), which decides generally, that an acknowledgment by one of several drawers of a joint, and several promissory note, takes it out of the

(*a*) Doug. 652.

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Statute of Limitations against the others, does not, in my opinion, support this action. It is not necessary to say now whether, if that case should ever come to be further considered, it would be found consistent with law, (although there is a later case (*a*), which is in some degree at variance with it), yet, I am warranted by Lord *Ellenborough* in observing, that taking it to be law, we ought not to be bound by it one iota beyond its own proper limit. That was the case of a payment on account by one of several persons who were originally liable, and that was considered as evidence of a promise by all. Here we are called upon to go one step further, and to consider payment of interest by one, originally liable, as evidence of a promise by several, not originally liable in their own right, but alieno jure, as executors of another person. I think we ought not to go that length, for if we did, it might introduce great inconvenience in the administration of the affairs of a testator, which is already attended with sufficient peril to those called upon to act in the character of executors. It might indeed produce great hardship and injustice by leaving executors absolutely without defence in many cases. Suppose an executor, after waiting a considerable length of time, and being perfectly satisfied that no further demands at law can be made against his testator's estate, and after having fully administered, it turns out (without any knowledge on his part) that another person, originally liable as well as the testator upon a promissory note, has paid interest or a small portion of the principal, whereby, after the lapse of six years, he acknowledges the debt still to be due: is that to be held as evidence against him, who stands merely in a representative character, and who upon a plea of plene administravit, can derive no advantage? Surely not; and we shall lay down no such doctrine in the present case. Having respect to the general rules of law, and being called upon to lay down a general rule, I think we are not warranted in extending *Whitcomb* v. *Whiting* to the case of an executor,

(*a*) *Brandram* v. *Wharton*, 1 B. & A. 463.

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whereby a possible, and by no means an improbable inconvenience may arise, by rendering executors and administrators liable to pay out of their own pockets, sums which they cannot compel the re-payment of, but by litigation; thereby creating much delay, confusion, and perplexity, which ought to be avoided, in order to render the duty as little burthensome as possible to those who take upon themselves the office of executor or administrator. For these reasons I am of opinion that this rule ought to be discharged.

BAYLEY, J.—My opinion is not founded on *Pittam* v. *Foster*, but on reasons independent of that case. Here the declaration is framed on promises, by *John Tredgold* in his life-time, and by the executors after his death; and unless the plaintiffs are entitled to recover, by producing evidence which takes the case out of the statute, either on one or the other set of promises, they must fail. They cannot take it out as to the promise by the testator, because he has been dead ten years. But it is insisted, that the case is out of the statute as to the executors, on the ground that one of the executors who had joined in the promissory notes, has made a payment of interest within six years, which operates in law as a promise by all the executors. I do not think that such is the legal effect of that payment. *Whitcomb* v. *Whiting*, is certainly a very strong case. Whether it does not go beyond the limits of law, is a question which, whenever a case like it shall come to be purely and by itself considered, may require revision. I can well understand, that if an action is brought jointly against two, a promise by either may be considered as taking the case out of the statute, but I think the principle cannot be carried further, by saying that it shall have the same effect where the note is not binding on both, but a separate note binding upon each. But there are two grounds on which this case is distinguishable from *Whitcomb* v. *Whiting*. One is, that the statute would discharge *John Tredgold*, because

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the payment in question was made after he was dead; and the other, that *Robert Tredgold* who made it was originally liable on the notes. The latest of the notes, in point of date, is *January*, 1809, and the statute would have operated as a discharge in *January*, 1815; and it is not until *May*, 1816, that *Robert Tredgold* paid the interest. At that time, therefore, *John Tredgold* ceased to be liable; and it was not competent for *Robert*, by a promise which he made at that period, to bring an obligation upon his father's executors. For the reasons stated by the Lord Chief Justice, I also think it would work great mischief, and produce great confusion in the administration of the assets of a testator, if we were to allow the promise made by one person who has joined in a joint and several obligation, to operate as the promise of the other.

HOLROYD, J.—I am of the same opinion. *Whitcomb* v. *Whiting* is the only case on which any argument in favor of the plaintiffs could arise; but that case has gone far enough, and ought not to be extended. Assuming it, however, to be law, it is perfectly distinguishable from this. There the defendant *Whiting* was liable upon the joint promise at the time the payment was made, and the Court held that sufficient to take the case out of the statute; and that is the utmost extent to which the argument, as to a joint and several promise, can be carried. But in the present case, *John Tredgold* was dead at the time the interest was paid. The joint promise could only affect *John Tredgold* in his life-time; therefore, whatever promise *Robert*, the survivor, might afterwards make, was not a promise to affect *John Tredgold*, nor his representatives. The doctrine contended for on the part of the plaintiffs, would go to this, that where two persons promise to pay a particular sum, after the statute has run, the fresh promise of one will operate to revive the liability of the other, and extend to his executors. I by no means agree to that. The executors in such case may plead non assumpsit as to their character

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of executor; but if they are sued as executors upon a promise by the testator, the plea of non assumpsit does not put in issue the executorial character, for in that case they must plead ne unques executor; but if they are charged upon a promise made by them in their executorial character, the plea of non assumpsit puts that in issue; and whether the plea of ne unques executor be pleaded or not, still it must be proved that they promised in the character in which they are sued. That however, is not done here, because the defendant *Knight* is found never to have been executor. Then it is argued, that whether executor or not, still he may be charged as executor, because if he is named in the testator's will as an executor, the law will imply a promise in that character, and call upon him to discharge himself, because he is otherwise liable to be charged as executor, although he never accepted that character. I doubt extremely that proposition. But it is not necessary to go to that extent in the present case, because *Whitcomb* v. *Whiting* is distinguishable from this. There the connexion between the parties was joint, upon a joint instrument, and the payment on account by one joint promiser was held to bind the other. Here there is nothing but a separate promise, which, at the time it was made, was totally independent of the other promiser.

BEST, J.—The case of *Whitcomb* v. *Whiting* has gone to the utmost verge of the law. No authority has been cited upon which it is warranted; *Bland* v. *Hasleriq* (a) is decidedly opposed to it, and if the point should ever again come under consideration, I think it will be found that the doctrine in *Ventris*, is more consistent with justice.

Rule discharged.

(a) 2 Vent. 151.

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## Ex parte CÆSAR HAWKINS.

A conviction on 24 *Geo.* 3. c. 47. s. 1, which subjects vessels having foreign spirits on board, to forfeiture, when found hovering, &c. within the limits of a port of this kingdom, must shew on the face of it, that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, &c.

*PLATT*, last Term, obtained a rule to shew cause why a writ of habeas corpus should not issue to the commander of his Majesty's ship *Severn*, commanding him to bring up the body of *Cæsar Hawkins*, who had been convicted under 24 *Geo.* 3. c. 47. s. 1, and sent by virtue of 3 *Geo.* 4. c. 110, on board that ship, to serve in his majesty's naval service. That part of the conviction on which the objections aftermentioned arose, was in the form following:—

"Be it remembered, that on, &c., *C. H.* hath been duly convicted before me, *A. P.* Esq. &c., of having been found and taken on board a certain vessel, to wit, a smack, subject and liable to forfeiture under the provisions of a certain act of Parliament, made and passed in the 24 *Geo.* 3. for that the said vessel was on, &c. found hovering within the limits of a port of this kingdom, to wit, the port of *Rye*, in the said county of *Sussex*, and then and there having on board, &c."

By 45 *Geo.* 3. c. 121. s. 7, every person, *being a subject of his Majesty*, who shall be found on board any vessel liable to forfeiture, under any of the provisions of that or any other act, for being found at anchor, &c., may be taken before a justice, and dealt with in the manner therein directed; and by 24 *Geo.* 3. c. 47. s. 1, it is enacted, that if any vessel shall be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, or shall be discovered to have been within the said limits or distance, (not proceeding on her voyage, wind and weather permitting, unless in case of unavoidable necessity and distress of weather, of which necessity and distress the master or other person having the command of such vessel, shall give notice and make proof before the collector of the customs of any port within the limits of which the vessel shall be found, immediately after

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her arrival), having on board any brandy, &c., shall be liable to forfeiture. It was objected that the conviction was bad, first, because it did not shew that the defendant was a subject of his Majesty, and liable to punishment for being in a vessel found hovering; and second, because the mere act of hovering was no offence, unless the conviction went on to shew that the vessel was not proceeding on her voyage, wind and weather permitting, &c.

*Jervis* now shewed cause, and contended, first, that as the 24 *Geo.* 3. c. 47. s. 1. was general in its terms, and did not mention subjects of his Majesty, the conviction need not necessarily shew that the party convicted was a *British* subject. If the defendant here was not a *British* subject, that was matter of defence before the Justice, which he was at liberty to prove; but the conviction need not shew the fact affirmatively. Then second, the statute comprehended three distinct offences, first, being found at anchor; second, being found hovering; and third, being discovered to have been within certain limits. The words "not proceeding on her voyage, &c.," were in a parenthesis, and evidently applied to the last-mentioned offence; and consequently need not have been noticed in this conviction.

*Platt*, contrà, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the offence is not sufficiently described. All that appears is, that the vessel was hovering within certain limits. A vessel may be hovering within the limits of a port, and may not be proceeding on her voyage, and yet may not be liable to forfeiture. She may be prevented by stress of weather from proceeding on her voyage, and absolute necessity may compel her to hover. It is much too narrow a construction of the statute to say that the mere act of hovering is sufficient to sustain the conviction, unless the circumstances mentioned in the parenthesis are negatived. This objection, therefore, is well

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founded. As to the other, I am strongly inclined to think, that the jurisdiction of the magistrate is insufficiently described, inasmuch as the conviction does not state that this party is a *British* subject, for if he be not, he is not guilty of any offence, in consequence of his vessel being found in the situation described. It is very easy to fill up these convictions by stating that the party is a *British* subject, and to add, that when found hovering, the vessel was not proceeding on her voyage, wind and weather permitting.

HOLROYD, (a), and BEST, Js. concurred.

Rule absolute.

(a) *Bayley*, J. was absent.

LATHAM and Others *v.* RUTLEY and Others.

*Wednesday, June* 4.

Plaintiffs declared against defendants on their common-law liability as carriers, for the loss of a parcel, and it appearing that the course of dealing between the parties was for plaintiffs to pay defendants an annual sum for the carriage of parcels between *L.* and *D.*, and on the receipt of each parcel, defendants were in the habit of delivering to plaintiffs a written acknowledgment, stating that they undertook to deliver the same as directed, "fire and robbery excepted;" and the Jury having found that this was the contract between the parties, though the loss was occasioned by negligence only:—Held, a fatal variance.

ASSUMPSIT by the plaintiffs, bankers, at *Dover*, against the defendants, as common carriers between *Dover* and *London*, for not safely carrying a parcel, containing promissory notes of the value of 1350*l.*, from *London* to *Dover*. Plea, the general issue. At the trial before *Abbott*, C. J, at the *London* adjourned Sittings, after last *Michaelmas* Term, the plaintiffs proved a primâ facie case, for damages to the amount of 900*l.* The defendants then put in evidence a special agreement made between themselves and the plaintiffs, by which it appeared that the defendants were in the habit of carrying parcels for the plaintiffs, between *Dover* and *London*, for the annual sum of 52*l.* 10*s.*, and that upon the receipt of every parcel, a written acknowledgment of its reaching the defendants' hands was given by them to the

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plaintiffs or their servant, which stated, that the defendants undertook to deliver the same as directed, "fire and robbery excepted." Upon this evidence it was contended, that the notes inquestion having been delivered to the defendants according to this course of business, the contract should have been declared upon specially; and as the plaintiffs had merely declared against the defendants upon their common-law liability, this was ground of nonsuit for a variance. The learned Judge declined nonsuiting, but left three questions to the Jury; first, whether they were satisfied that the notes, or any, and how many of them, ever reached the defendants' hands; second, whether the parcel containing them was received under a special contract to carry "fire and robbery excepted;" and third, whether the parcel was lost either by fire or robbery, within the meaning of the exception. The Jury found, first, that notes, to the amount of 900*l.*, had reached the defendants' hands; second, that the parcel containing them was received under a special contract to carry, "fire and robbery excepted;" and, third, that the loss was not occasioned by fire or robbery, but by the negligence of the defendants. The Jury, therefore, under the learned Judge's directions, found for the plaintiffs, damages 900*l.* with liberty to the defendants to move to enter a nonsuit.

*Scarlett*, in *Hilary* Term last, moved accordingly, and obtained a rule nisi.

*Copley*, S. G., *Denman*, C. S., and *Kaye*, now shewed cause. There is no variance in this case. The action is brought upon a general common law contract, by which the defendants were bound to carry the goods safely and securely, and it is so stated in the declaration. The Jury, by their verdict, found that the defendants entered into that contract, with the exception, that they would not be liable for any loss occasioned by fire or robbery; and they also found that this loss was not occasioned by either of those means. The question, therefore, is, whether the plaintiffs were or were not

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bound to set out that exception in their declaration, and so to sue upon a special, instead of a general contract. The plaintiffs, certainly have done quite enough, in setting out the general contract, and there is no substantial variance between the evidence and the declaration. If, indeed, it had been in proof, that the loss was occasioned by robbery, or by fire, there would have been a fatal variance, but that the Jury have expressly negatived, and the contract, as set out, was substantially proved by the defendants' receipts for the goods. [*Abbott*, C. J. Such an exception from the common law liability as the law itself would sanction, certainly need not be set out; but this is not such an exception; by the common law, the defendants would be liable for a loss either by fire or robbery.] This action is founded upon the carrier's common law liability; no doubt a carrier may, by special proviso, limit that liability, but the facts found by the Jury here, shut the defendants out from the benefit of their proviso. [*Abbott*, C. J. Are you warranted in calling the exception here, a proviso? Was it not rather a part of the receipt? The contract was certainly a qualified one, and as the circumstances of fire and robbery were specially excepted out of the contract, should not these exceptions have been specially set out? *Holroyd*, J. These goods were never received upon the common law liability, but upon the terms of a special and qualified contract; then surely that should have been stated.] However, the defendant may have attempted to qualify or divide the contract, it is, in fact, general and entire, and even where an agreement consists of distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement, *Clark* v. *Gray* (a). [*Abbott*, C. J. The result of the cases upon this subject is this; if the carrier's notice is, that he will not pay more than 5*l.* upon any goods, it limits the amount of the liability only, and need not be set out in the declaration; but if it is, that he will

(a) 6 East, 569.

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not pay any thing upon goods which exceed *5l.* in value, there it limits the liability altogether, and is such a special exception as must be set out. In that view, do not the present plaintiffs fail, as well upon the merits as in form? *Bayley*, J. There never was any general contract between these parties; the exception was always part and parcel of the contract.] Certainly the general common law contract existed between them, and a general written contract was unnecessary, because the exception was no more than a limitation of the common law liability. Nor is there any written contract except by inference; for all that appears it is a mere parol agreement, and therefore the limitation as to fire and robbery, is made by way of proviso, and cannot be received as an express exception. The Jury certainly found that the parcel was received "fire and robbery excepted," but upon what grounds they so found it, is difficult to imagine. Nor will their finding constitute a variance from the mere circumstance of their adopting the word "exception;" whether that constitutes a variance, must depend upon the legal and technical meaning of that word. The plaintiffs have stated that part of the defendants' promise, the breach of which they complain of, and that is sufficient, without setting out other parts irrelevant to the breach. *Miles* v. *Sheward* (*a*). [*Bayley*, J. referred to *Brown* v. *Knill* (*b*), as shewing that in covenant for not repairing if it contains an exception, it is fatal on non est factum, to state it in the declaration as a general covenant.]

*Scarlett* and *Marryatt*, contrà, were stopped by the Court.

Abbott, C. J.—We have all felt great reluctance in yielding to this objection, because the justice of the case is evidently the other way. We have therefore endeavoured, if possible, to get over the difficulty, but we find ourselves bound by strict legal principles, to say, that this is a fatal

(*a*) 8 East, 7. (*b*) 5 J. B. Moore, 164.

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variance between the declaration and the evidence, and consequently that the plaintiffs cannot maintain this action. The distinction now taken between an exception and a proviso, is very subtle and ingenious, but as that point was not raised at the trial, it cannot properly be allowed to have any influence upon our decision. We are all of opinion, that by strict legal construction, this was a qualified undertaking on the part of the defendants, and that the averment in the declaration is inconsistent with the contract as proved in evidence. The rule, therefore, for entering a nonsuit, must be made absolute.

Rule absolute.

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MORGAN, Assignee of JOHN JONES, a Bankrupt v. PRYOR.

*Wednesday, June 4th.*

A certificated bankrupt is a competent witness to prove the signatures of the commissioners to the proceedings under his commission.

ASSUMPSIT on a policy of insurance on goods on board the *Nathan*, at and from the coast of *Africa* to *Liverpool*. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last *Trinity* Term, no notice having been given to dispute the commission, the proceedings were put in to prove the petitioning creditor's debt, the trading, and the act of bankruptcy. It was objected, that the proceedings must be proved, when the petitioning creditor, who was solicitor under the commission, was called to prove the hand-writing of the commissioners. His evidence was objected to, and the Chief Justice held the objection valid. The bankrupt was afterwards called to prove the hand-writing of the commissioners, when his evidence was objected to, on the ground that he was not a witness to prove the validity of the commission. The learned Judge, however, admitted the evidence, but saved the point.

*Scarlett*, in *Michaelmas* Term, obtained a rule nisi to enter a nonsuit, and

*Copley*, S. G. and *Parke*, now shewed cause. The bankrupt was competent to prove the fact of a commission having

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been sued out against him. He was certificated, and therefore had no interest in the result of the suit. His evidence did not go to any fact respecting the validity of the commission. He was competent to prove his own identity, as the person whose assignee the plaintiff was, and if so, what objection was there to his proving the identity of the commission? His testimony in this respect went to prove nothing which could influence the verdict one way or the other. Had he been called to prove any fact necessary to support the commission, he would be inadmissible, according to *Chapman* v. *Gardener* (a), because he would then have an interest in upholding the commission; but here he had no interest. They cited *Rex* v. *Netherlong* (b).

*Scarlett* and *F. Pollock*, contrà. The bankrupt was incompetent, because he was in effect called to prove his own bankruptcy, by identifying the proceedings under the commission. It is every day's practice at Nisi Prius, that plaintiffs are nonsuited for want of sufficient evidence of the very fact for which this bankrupt was called, and are never permitted to resort to the bankrupt himself. If a bankrupt is admissible to prove this fact, where is the line to be drawn, and at what point is he to be rejected? Here the bankrupt was called to prove the commissioners' signature to the proceedings. If he is competent to prove one document, why not another, and if for one purpose, why not for all purposes? The relaxation of the rule of evidence in this particular, will be productive of serious consequences, for by these means his evidence may be admitted to prove his own hand-writing to a letter, which may be evidence of an act of bankruptcy, or any other fact, however important, to support the commission. In a recent case of *Firbank*, Assignee of *Dell* v. *Hendrey*, before *Wood*, B. at *York*, the bankrupt was tendered as a witness to prove the cause of his absence from his place of business, but his evidence was excluded, and this Court afterwards confirmed

(a) 2 H. Bla. 279. (b) 2 M. & S. 337.

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the decision. That case is expressly in point. It was the duty of the assignees to prove the commission by competent evidence in the first instance; they are bound to prove their own title to sue, before the bankrupt can be made a witness at all; they cannot patch up their title by his testimony. And how did the proceedings prove themselves? How did it appear that they were not the proceedings in some other commission against some other person? All this was assumed, if not proved by the bankrupt, and if proved by him, was proved by an incompetent witness.

ABBOTT, C. J.—I am of opinion, that this rule ought to be discharged. The bankrupt had obtained his certificate, and had released his creditors; he had therefore no possible interest in the event of the suit, and he was in my judgment, generally speaking, a competent witness. Certainly he was not competent to prove any fact which tended to support the commission. But what did he prove in this instance? Simply the commissioners' signature to the depositions. Now those depositions are by the 49 *Geo.* 3. c. 121. s. 10, made evidence in themselves, without the ordinary common law proofs; and therefore as the validity of the commission depends, not on the signatures of the commissioners, but on the facts which the depositions contain, he really proved nothing which involved any question as to the validity of the commission.

BAYLEY, HOLROYD, and BEST, J.'s concurred.

Rule discharged.

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*Wednesday, June 4.*

SHONE and Another, Assignees of J. T. EGLING a Bankrupt, *v.* LUCAS and Another.

Insolvency within the meaning of the bankrupt laws, does not mean an inability to pay twenty shillings in the pound, when the affairs of a bankrupt shall be ultimately wound up; but a trader is in insolvent circumstances when he is not in a condition to pay his debts in the usual and ordinary course of trade and business.

ASSUMPSIT for money paid by the bankrupt to the defendants, after an act of bankruptcy committed. Plea, non assumpserunt. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after *Michaelmas* Term, 1822, the defence was, that the defendants had received the money in question in the ordinary course of trade, and without any knowledge at the time of receiving it, that the bankrupt was insolvent. The act of bankruptcy relied on was committed in *October*, 1820; the commission was dated 6th *September*, 1821; and the sums of money sought to be recovered were received by the defendants between the beginning of *February*, 1821, and the date of the commission. The bankrupt had been a tavern-keeper, and the defendants were his wine and spirit merchants, who had supplied him from time to time with goods in the way of their trade. Upon the evidence adduced at the trial, the verdict was found for the defendant, and on shewing cause now against a rule nisi for a new trial, the case turned upon the meaning of the word "*insolvent*" in the statutes concerning bankrupts.

After hearing *Scarlett* and *Chitty* for the plaintiffs, and *Marryatt* and *V. Richards* for the defendants, the judgment of the Court was delivered by

ABBOTT, C. J.—We are of opinion that the rule for a new trial must be made absolute. The action is brought to recover back sums of money paid by the bankrupt after an act of bankruptcy committed. In order to justify the detention of these sums, the defendants must shew that they were received in the ordinary course of trade and dealing, and without knowledge, at the time of receiving them, that





the bankrupt was insolvent. That brings the case to the question as to what is the meaning of the word *insolvent*, in the statutes concerning bankrupts. The case of *Bayly* v. *Scofield* (*a*), has decided that insolvency, within the meaning of the bankrupt laws, does not mean an inability to pay twenty shillings in the pound when the affairs of the bankrupt shall be ultimately wound up, but that a man is in insolvent circumstances "when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." That is decided to be the meaning of the word "insolvent." Did the defendant know that the bankrupt in this case was unable to pay according to the ordinary course of trade, and as a man carrying on trade ought to pay? We find, that as early as the 28th *January*, 1821, a bill accepted by the bankrupt for 57*l.* 11*s.* is returned unpaid; that on the 17th *February*, in the same year, another bill for 106*l.* 9*s.* 6*d.* is also returned unpaid; and that on the 17th *March*, a third bill is returned unpaid. The return of these bills unpaid, shews that the party was not able, in the ordinary manner in which trade and business is carried on, to pay bills which he had accepted. Another part of the evidence is, that in *January* or *February*, (the time is left uncertain), there was a meeting between one of the defendants and the bankrupt, at the office of an attorney, at which the defendant was pressing to have a warrant of attorney given for money then over due; and a man does not ask for a warrant of attorney, unless he supposes it is necessary to enable him at a short notice to take possession of the effects of his debtor, in order to secure himself against the demands of other creditors. It further appears, that at that period, he knew that the bankrupt was embarrassed, for he complained that he had not paid according to the usual course of credit, as he had promised to pay. This the bankrupt seemed to deny, and said, he ought not to press him so much, having previously received money from him to the amount of 1300*l.* The defendant said, he had not paid

(*a*) 1 M. & S. 338.

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him so fully as he expected; the bankrupt said he had not given the credit he expected; but it is distinctly proved, that as early as *January* or *February*, 1821, there is a pressure for a warrant of attorney, with a declaration by the defendant, that he knows the bankrupt is in embarrassed circumstances, and we find that in point of fact a warrant of attorney is given on the 26th *May*, 1821. It seems to us, therefore, that the Jury should have concluded that this defendant knew that the bankrupt was insolvent at some period before these payments were made; it is unnecessary to say precisely at what period, the period not being ascertained, but we are satisfied that upon this ground, and on the authority of the case cited, the rule for a new trial must be made absolute, but on payment of costs.

Rule absolute, on payment of costs.



*Thursday, June 5.*

BALDEY and Another *v.* PARKER.

Where a person entered a tradesman's shop and selected various articles, some of which he marked with a pencil, and others were cut from piece goods, and laid aside for him, (the whole amounting to more than 10*l.*) and desired them to be sent home, and when sent, he refused to take them:—Held, first, that the contract was joint; and second, that there was no acceptance to take the case out of the statute of frauds.

ASSUMPSIT for goods bargained and sold. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last *Trinity* Term, the case proved on the part of the plaintiffs was this:—The defendant called at the shop of the plaintiffs, retail linen drapers, and asked to look at some goods; various articles were shewn, the prices of which he inquired, and complained of as too high, but he selected some pieces of *Irish* linen, upon which he made a pencil mark, and which he removed from one part of the counter to another. He also selected several handkerchiefs, some of which were by his desire and assistance cut off and laid separately from the rest. The articles were all selected at one interview, which occupied about a quarter of an hour;

no one of them amounted to 10*l.* in value; the value of the whole together was about 70*l.* The defendant, on leaving the shop, desired the goods to be sent immediately to his house, but declined giving his name. In the afternoon of the same day, the goods were sent, according to the defendant's direction, with a bill of parcels amounting to 70*l.* 11*s.* 4½*d.* but without any name, when the defendant, after expressing his disappointment at not seeing the person with whom he dealt in the morning, inquired of the bearer what discount would be allowed. He was told that no more than 5*l.* per cent. could be allowed, which he said was too little, as he expected at least 20*l.* per cent. The bearer of the goods not being authorised to make that allowance, and the defendant declining to pay for the goods on any other terms, they were taken back to the plaintiff's shop, and were afterwards tendered for delivery at the defendant's house in his absence, but were refused to be taken in by his servant; in consequence of which, the present action was brought. The learned Judge being of opinion, on this evidence, first, that the contract was joint, and therefore to an amount exceeding 10*l.*, and second, that there had been no delivery and acceptance to take the case out of the statute of frauds, directed a nonsuit, with liberty to the plaintiffs to move to enter a verdict.

*Denman*, C. S. in *Michaelmas* Term last, obtained a rule nisi accordingly; and now

*Scarlett* and *E. Lawes*, on shewing cause, were stopped by the Court.

*Denman* and *Platt* in support of the rule, contended that the case was not within the statute of frauds; first, because the sale could not be considered as a joint contract, inasmuch as each article was purchased at a distinct and separate price; and second, supposing the contract to be joint, still there was such a delivery and acceptance as took

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the case out of the statute. They cited *Rugg* v. *Minett* (a), *Emmerson* v. *Heelis* (b), *Hodgson* v. *Le Bret* (c), *Searle* v. *Reeves* (d), *Stadt* v. *Lill* (e), *Blenkinsop* v. *Clayton* (f), *Chaplin* v. *Rogers* (g), *Howe* v. *Palmer* (h), *Anderson* v. *Scott* (i), and *Tempest* v. *Fitzgerald* (k).

ABBOTT, C. J.—We have, on more occasions than one, lately given our opinion (l), as to the beneficial provisions of this statute, and have declared it to be our duty so to construe it as to further the manifest object of the legislature, which was, the prevention of fraud by mistakes in, or misrepresentation of, the terms of contracts. In the present case, it appears from the evidence, that the defendant went into the plaintiff's shop, for the purpose of purchasing goods, and after being there some time, at last bargained for a great many different articles. He enquires the price of each, and as to some he "chaffers," (to use the expression of one of the witnesses) for the price; some handkerchiefs are severed from the pieces by his directions, and upon some *Irish* linen, he puts his mark (not his name), in order to satisfy his own mind, when the goods shall be delivered, that those were the goods he meant to buy. He then leaves the shop. The first question is, whether this was one entire contract for the sale of all the goods so purchased. If we were to hold it was not, we should, in a great many cases, be entirely defeating this wholesome statute, and rendering it of no value, for it would be in the power of parties in order to evade the statute, where the object was to purchase several articles, which, together, would amount to more than 10*l*. to make a specific bar-

(a) 11 East, 210.
(b) 2 Taunt. 38.
(c) 1 Campb. 233.
(d) 2 Esp. 598.
(e) 9 East, 348.
(f) 1 J. B. Moore, 328.
(g) 1 East, 192.
(h) 3 B. & A. 331.
(i) 1 Campb. 235, n.
(k) 3 B. & A. 680.
(l) See *James* v. *Spencer*, ante, vol. i. p. 32. *Hanson* v. *Armitage*, Id. 128. *Garbutt* v. *Watson*, Id. 219. *Carter* v. *Toussaint*, Id. 515. and *Price* v. *Lee*, Id. vol. ii. p. 295.

gain for each, so as to defeat the intention of the legislature. Looking to the whole of this transaction, my opinion is, that it was one entire bargain for all the goods, and consequently being for a sum exceeding 10*l.*, it is void, unless there has been an actual receipt of part of the goods. Then, secondly, is this case within the exception? The words of exception in the statute are, "except the buyer shall accept part of the goods so sold, and *actually receive* the same." It would be difficult to find words in the *English* language, more strongly importing an actual transfer, and handing over of the thing from the seller to the buyer, and a taking possession on the part of the latter. Has that been done in this case? It is true the defendant puts his mark upon some articles, but that might merely be for the purpose of identifying them. He goes away and leaves all the goods behind him. If we were to hold under these circumstances, that there had been an acceptance to take the case out of the statute, I think we should find it difficult to say, that if the supposed buyer brought an action of trover for these goods, he could not succeed; for to that extent the argument must be carried. If this be a complete sale, and a delivery of the goods, as effectually as if they had been delivered from hand to hand, so as to pass the property in them, the buyer would have a right to have them without paying the price, and might sue the vendor for the value. The consequence of such a decision would be highly injurious to persons carrying on trade. It often happens, that a person goes into a tradesman's shop, and makes a bargain for an article which is to be sent to his house, and the shopkeeper, in the ordinary course of business (unless he means to give credit), takes care to send a bill and receipt, and gives directions to the person carrying the goods, not to deliver them without receiving the money. Under such circumstances, it would be exceedingly injurious to trade, to hold, that these acts would have the effect of compelling the seller of the goods, to give them over to the buyer, and

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subject him to an action of trover if he refused. For these reasons I am of opinion this action cannot be maintained.

BAYLEY, HOLROYD, and BEST, J.'s., concurred.

Rule discharged.

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Thursday, June 5.

## CAYME v. WATTS.

An order of nisi prius, referring an action of debt on a money bond, (where the issue was payment by a co-obligor), *and all matters in difference* to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the Court refused to set aside an award directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out, without proof that there were other matters in difference between the parties.

DEBT on a money bond. Plea, payment by another person, party to the bond, and issue thereon. By an order of nisi prius, at the last Assizes for *Somersetshire*, this cause and all matters in difference were referred to the arbitration of a gentleman at the Bar. The arbitrator, by his award, directed a verdict to be entered for the plaintiff generally. On a former day a rule nisi was obtained for setting aside the award, on the ground that it did not decide the question between the parties, inasmuch as the object of the reference was, that the arbitrtaor should specifically direct for what sum the verdict should be entered, and execution taken out, whereas by the award as it stood, it was competent to the plaintiff to take out execution for the whole penalty of the bond.

*Merewether* shewed cause, and contended, that as the order of nisi prius did not contain any specific direction to the arbitrator as to the manner in which he was to make his award, and as there was nothing before the Court to shew that there were any other matters in difference between the parties, but the issue on the record, his award was conformable to the order of nisi prius, and could not be disturbed.

*Wilde*, contrà, urged, that according to the spirit of the order of nisi prius, it might reasonably be understood by the arbitrator, that his attention was not to be confined

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to the mere issue on the record, but was to decide for what sum the defendant was actually liable, for otherwise the latter might be liable to execution for the whole penalty of the bond, although the greater portion of the debt might have been paid. The award, therefore, did not settle all matters in difference between the parties.

ABBOTT, C. J.—Looking to the order of nisi prius, and to the issue on the record, and having nothing else before us, I think the award is sufficient. This was an action of debt for the penalty of the bond, and if the plaintiff recovered a verdict, the judgment must have been for the whole penalty. The defendant pleaded payment by another person, who was party to the bond, and that was the only issue. The order of nisi prius, is for a reference of this cause, and all matters in difference, but it does not appear that there were any other matters in difference between the parties, or that there was any question as to how much remained due on the bond. The arbitrator has therefore done right in directing that the verdict should stand.

BAYLEY, J.—We cannot, without an affidavit, assume that there were any other matters in difference between the parties except what appeared on the face of the order of nisi prius itself. The order does not import that it was at all a question between these parties how much was due, or for how much the verdict was to be entered. The argument urged in support of this rule, is applicable wholly to actions of assumpsit, and not to actions of debt on bond (*a*).

BEST, J., concurred.

Rule discharged, without costs.

(*a*) *Holroyd*, J., was absent.

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*Thursday, June* 6.

## Doe, d. Thwaites *v.* Roe.

If there is reasonable and probable cause for coming to the Court against an attorney, although it shall turn out that there is no actual foundation for imputing misconduct to him, the Court will not give him his costs of the application.

In this case a rule had been obtained calling on an attorney to answer the matters of an affidavit. The case was referred to the Master, who now reported that there was no foundation for the application, and no reason for making the rule absolute, but added, that there was reasonable and probable cause for coming to the Court. Under these circumstances, the question was, whether the rule ought to be discharged with costs. After hearing

*Curwood*, in support of the motion, and *Marryat*, contrà.

Abbott, C. J., said—If an attorney behaves himself in such a manner as to excite reasonable ground for thinking that he has misconducted himself in his character of attorney, although upon investigation it shall turn out that there is not sufficient ground for imputing actual misconduct to him, yet that there was sufficient ground for bringing the matter before the Court, we think we ought not to give him costs.

Rule discharged, without costs.

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*Thursday, June* 5.

## Draper *v.* Garratt and Another.

In case for not taking sufficient pledges in a replevin bond, the declaration set out the record, and averred under a videlicet, that the plaint in the County Court, was levied before *A. B. C.* and *D.*, as suitors, and it appearing from the record itself, that it was levied before *E. F. G.* and *H.*;—Held, no variance.

Case against the Sheriffs of *Middlesex*, for taking insufficient pledges in a replevin bond. The declaration set out the record in the replevin suit, and averred under a videlicet, that the plaint was levied at the County Court,

"before *A. B. C.* and *D.*, (naming them) as suitors of the said Court." At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after last *Easter* Term, it appeared from the record that the plaint was in fact levied before *E. F. G.* and *H.*, upon which it was objected, for the defendants, that this was a fatal variance. The learned Judge over-ruled the objection, but reserved the point, with liberty for the defendants to move to enter a nonsuit.

*Scarlett* now moved accordingly, and contended, that the variance was fatal. It was essential to this action, that the plaintiff should set out the record of the former suit; and in doing that, he could not be allowed in any respect to alter the language, although he might, if he chose, in some parts abridge it. The description of the place, and the parties, being stated under a videlicet, would not at all vary the effect of it, because it was still necessary that the names should be truly set out. The rule of law upon this subject had been laid down in *Bristow* v. *Wright* (*a*), and had been ever since carefully and strictly adhered to by the Courts. [*Bayley*, J. Is there not a very recent case in this Court, in which it was held, that in assumpsit for not indemnifying bail, an averment that a judgment was recovered against the plaintiff in *Michaelmas* Term, and evidence that the judgment was in *Hilary* Term, made no variance?] That is *Phillips* v. *Shaw* (*b*), and certainly was so decided; but that cannot govern the present. Here the variance is in setting out a *record*, which is a much more important matter than the description of the *term* in that case. It may have been unnecessary for the plaintiff to set out this particular part of the record at all, but having undertaken to do it, he was bound to do it correctly, and the neglect is fatal to him. *Webb* v. *Herne* (*c*), and *Whitwell* v. *Bennett* (*d*). It is a general rule that impertinent matter may be rejected as sur-

(*a*) Doug. 642.
(*b*) 4 B. & A. 435.
(*c*) 1 Bos. & Pul. 231.
(*d*) 3 Bos. & Pul. 559.

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plusage (a); but if it is relevant it cannot. Here it is relevant, because the action is actually founded on the record in the County Court, and the plaintiff cannot aver against the record. Suppose the replevin to have been in *C. B.*, and the declaration described it as in *B. R.*, this would be a material variance. Here the declaration professes to set out the whole record, and the plaintiff is bound by it.

ABBOTT, C. J.—*Bristow* v. *Wright* is distinguishable from the present case; for there the rent was not laid under a videlicet, and no certain or fixed amount of rent was stated. When this objection was raised at Nisi Prius, I was inclined to yield to it; but I am now of opinion that it is without foundation. Undoubtedly, in order to maintain this action, it was necessary for the plaintiff to shew by his declaration that a plaint had been levied, but it was not incumbent on him to name the suitors. That part of the declaration therefore may be rejected altogether; and there was abundant evidence to support the fact that a plaint was levied. In *Bushy* v. *Watson* (b), a declaration for maliciously indicting at the *General Quarter Sessions*, instead of the *General Sessions*, was held to be sufficient; and *De Grey*, C. J., at the conclusion of his judgment, gives a reason for that decision, which is applicable to the present case. He says, "As the indictment was cognizable both at the Quarter and the General Sessions, we think the insertion of the word *Quarter* was immaterial and merely surplusage. Otherwise, had it been cognizable only at a Quarter Sessions." On the authority of this case, and of *Phillips* v. *Shaw*, I think this is no variance.

BAYLEY, J.—The only averment necessary in this case was, that a plaint was levied at the next County Court; and if that was substantially proved, it was sufficient. The rest of the averment was perfectly immaterial. In *Purcell* v.

(a) *King* v. *Pippet*, 1 T. R. 235.
(b) 2 Sir W. Bl. 1050.

*Macnamara* (a), which was an action for a malicious prosecution, a variance between the day of the plaintiff's acquittal, as laid in the declaration, and stated in the record, was held to be immaterial, upon that very principle; and the case of *Phillips* v. *Shaw*, which I before alluded to, is another authority to the same effect.

HOLROYD, J.—The substance of the plaintiff's allegation was proved in evidence to be true, and, being laid under a videlicet, that is sufficient, without proving the whole. The case of *Bristow* v. *Wright* cannot govern the present; the variance there was in an extremely important particular; for it affected both the quality of the rent to be paid, and the nature of the term to be demised; and an error on such a point was material and substantial. But the later cases cited by the Court I think govern the present, and to them may be added *Judge* v. *Morgan* (b), and *Pippet* v. *Hearne* (c).

BEST, J.—I do not quite agree with the distinction which was taken in *Bristow* v. *Wright* and *King* v. *Pippet* (d); for it appears to me that *impertinent* and *immaterial* are synonimous terms. I cannot therefore consider the rule respecting variances as depending on such a distinction; I think the safer rule is, that whatever is necessary to be proved, must be correctly set out, and no more. In this case, all that it was necessary for the plaintiff to prove, was correctly set out.

Rule refused.

(a) 9 East, 157.
(b) 13 East, 547.
(c) Ante, vol. i. 266.
(d) 1 T. R. 265.

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*Friday, June 6.*

After a rule granted under 1 *Geo.* 4. c. 87, in a cause entitled "*Doe, &c.* v. *Roe*," to which the tenant in possession appeared, judgment was entered up, and execution taken out against the tenant by *name*: Held, no irregularity.

## Doe, d. Marquis of Anglesey *v.* Brown.

*JEREMY*, last Term, had obtained a rule absolute in this case for the defendant to enter into the recognizances required by the 1 *Geo.* 4. c. 87. within fourteen days from the date of the rule, or else the plaintiff to sign final judgment (*a*). In consequence of the defendant's default judgment was signed accordingly, and

*Manning* now moved to set it aside for irregularity, the rule for judgment being entitled "*Doe, &c.* v. *Brown*," whereas the original rule had been entitled, as indeed it properly should be, "*Doe, &c.* v. *Roe*." On this account the defendant *Brown* had treated the whole proceeding as a nullity; he had not entered into the recognizance, nor attended the meeting for taxation; but the plaintiff had obtained possession of the premises, and had been awarded the costs both of the taxation and the rule. These advantages he was not entitled to as against the present defendant under this rule; for the defendant was no party to it, and could not be bound by it. That part of the proceedings therefore ought to be set aside.

Per Curiam.—Perhaps the judgment and the second rule may have been improperly entitled, though that is by no means clear. The language of the statute is, that the "rule shall be made for entering up judgment for the defendant" generally, not stating against whom, and not stating that it is to be against the casual ejector. After the defendant has appeared, the judgment should be against him by name. Here the defendant has appeared, and we think there is no irregularity.

Rule refused.

(*a*) Ante, vol. ii. p. 638.

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*Saturday, June 7.*

MERRINGTON and Another *v.* CHARLES BECKETT, Gent. one, &c.

It seems the Court will not call on a defendant to verify, on affidavit, a plea sworn by the plaintiff to be false, nor require the defendant's attorney to disclose the authority by which he pleads a sham plea

*COMYN* had obtained a rule nisi, for the plaintiff to sign judgment for want of a plea, on an affidavit that the plea was false, and pleaded for delay. The plaintiff was a linen draper, and the defendant an attorney of this Court, and the action was brought to recover 19*l.*, the amount of linen drapery goods supplied by the plaintiff to the defendant. The plea stated "that after the making of the promises, &c., the defendant delivered to the plaintiff ten pieces of *Irish* sheeting, ten pieces of *Russia* sheeting, and ten pieces of *Holland* sheeting, of the value of 20*l.* in full satisfaction, &c." and "that the plaintiff accepted the same in full satisfaction, &c."

*Langslow* shewed cause, and after citing *Gaitskill* v. *Greathead* (*a*), was stopped by

ABBOTT, C. J. who said, The effect of this rule is to call on the defendant to say on oath, whether his plea is true or false. I have great doubt whether we are justified in imposing such a task on any defendant, though I think we have the power of calling on his attorney to shew by what authority he has put such a plea on the record. But in this case the defendant, though an attorney, appears in the character of a suitor, and not as an officer of the Court, and he is entitled to all the privileges attaching to any other suitor.

*Comyn*, in support of the rule. The plea is sworn to be false, and there is no reason why the Court should in this instance deviate from the rule recently laid down in *Richley* v. *Proone* (*b*).

(*a*) Ante, vol. i. 359. (*b*) Ante, vol. ii. 661.

1828. MERRINGTON v. C. BECKETT.

ABBOTT, C. J.—It is the anxious wish of the Court that all proceedings should be so conducted as not to produce any unnecessary vexation or delay to the suitors; but we are equally anxious to avoid any decision which may be construed into a precedent for infringing the general rules affecting the administration of justice. I am fearful that might be the result if we were, of our own authority, to call on a defendant beforehand to make known his defence to an action. I cannot help thinking, that in compelling such a disclosure, we should be infringing on the province of the Jury,* and if we were once to adopt so dangerous a course, I know not where it would be possible to draw the line. We have the authority of Lord *Holt*, in the case of *Pierce* v. *Blake* (a), for saying, that where the officers or attornies of the Court misconduct themselves, or put any deceit upon the Court, or upon the suitors, the Court has the power of punishing them. That is the only course, as it seems to me, that we are justified in taking. I think the Court will act most discreetly by trying the course which I have suggested, namely, where a plea is sworn to be false, to call on the attorney to shew by what authority he has put it on the record; but to avoid trying the merits of the *action on contradictory affidavits by the parties. Under this impression, I am of opinion that this rule should be discharged.

BAYLEY, J.—The case of *Richley* v. *Proone* was decided before my Brother *Holroyd* and myself only, at the Sittings after last Term, and therefore it is proper for me to say that the decision was founded precisely on the principle now laid down by the Lord Chief Justice, namely, that it was the duty of the Court to punish the misconduct of their officers, and to protect suitors from an unjust and unnecessary waste of time and expence. I am therefore of opinion that the Court came to a proper conclusion in that case,

(a) 2 Salk. 515.

although, for the reasons now stated, I agree that it will be most beneficial to all parties to discharge this rule.

HOLROYD, J. concurred.

BEST, J.—The inclination of my opinion is, that *Richley* v. *Proone* was erroneously decided. I think the plea in that case should not have been set aside in the first instance, but that the attorney should have been called upon to state on whose authority he pleaded it. I quite agree, that in the present case we have no right to call on a suitor to state his ground of defence; and therefore this rule ought to be discharged.

Rule discharged.

The case was again mentioned this day, by

ABBOTT, C. J., who said, We have deliberated further upon this point, and we are of opinion, that the Court has no power to demand of a suitor an affidavit that his plea is true. We have also considerable doubt whether the Court would be justified in calling on an attorney to shew by whose authority he pleads a dilatory plea, because that would in all probability be requiring him to divulge the confidential communications of his client. We now wish it therefore to be understood, that we lay down no general rule on this subject; we think it better for the present, to let the practice remain as it is; and we intend at our earliest convenience, to consider what mode can be safely adopted either by the Court in the exercise of its own jurisdiction, or by recommendation to the legislature for their interference to remedy the evils at present complained of. This decision will also apply to those cases in which rules have been obtained by defendants in error, to set aside the writs of error, on the ground that they have been obtained solely for delay; and therefore, both in this case and in *Winton* v. *Field*, in which a rule nisi has been granted for setting aside

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a writ of error, the rules must be discharged generally. In this latter course, we act chiefly on the authority of Lord *Kenyon*, in *Christie* v. *Richardson* (a), and the reasons there given by his Lordship, whom we consider as the safest guide for our conduct upon so intricate and perplexing a subject.

Rule discharged, without costs.

(a) 3 T. R. 78.

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*Saturday, June 7.*

## The King *v.* Israel.

Indictment for perjury assigned on evidence given in the Palace Court, described the Court as "the Court of the King's Palace AT *Westminster*," and it appearing from the record of the trial below, that it was called "the Court of the King's Palace OF *Westminster*:"—Held no variance. The same indictment averred, that the cause in which the alleged perjury was committed, "came on to be tried and was then and there duly tried by a Jury of *the county*;" and the record of the trial stated, that the Jury came of the neighbourhood of *Westminster*:—Held, that as the cause was in fact so tried, and no county being mentioned in the record, it was no objection.

INDICTMENT for perjury, assigned on evidence given by the defendant at the trial of an action in the Palace Court. The defendant having been found guilty before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last Term,

*Denman*, C. S., on a former day, moved for a rule to shew cause why the judgment should not be arrested, or a new trial granted, on two grounds, first, for a variance between the record and the evidence, in the description of the style of the Palace Court; and second, for a misdescription of the Jury before whom the cause in the Court below was tried. As to the first, the indictment alleged, that the evidence on which the perjury was assigned, was given "in the Court of the Palace, &c. AT *Westminster*;" but on producing the record of the proceedings, it appeared that the Court was described as "the Court of the Palace, &c. OF *Westminster*," instead of "AT *Westminster*." The proper style of the Palace Court is "the Court of the Palace OF *Westminster*." It is always so described in its own records, and is so designated in 23 *Geo.* 2. c. 27. s. 22, and 46 *Geo.* 3. c. 86. s. 24, and therefore it should have been so described in the indictment. The description of the

Court of the Palace AT *Westminster* is uncertain, for non constat, but there may be several other palaces AT *Westminster*. The palace "OF *Westminster*" is definite and intelligible, because it is the aula regia, and that particular palace of which *Westminster* Hall is the hall. The jurisdiction of the Palace Court is limited within a circle of twelve miles of the palace, and therefore if the centre of its jurisdiction be rendered uncertain, its limits must become doubtful. Upon this point he cited 2 *Salk.* 439. 10 *Rep.* 3. *Black. Com.* 76. and Sir *B. Morris's* History of the Palace Court. Then secondly, the indictment averred, that the cause in the Court below came on to be tried, "and was then and there duly tried by a Jury *of the county*." Now the only county mentioned in the indictment is *Middlesex*, but several other counties are included in the jurisdiction of the Palace Court, and in point of fact the Juries are indifferently selected from all those counties. Therefore on this ground the defendant is entitled to a new trial. To this point he cited *Com. Dig.* tit. *Court* (*a*).

The Court took time to consider of the case, and judgment was now delivered by

ABBOTT, C. J.—We are of opinion that the defendant is not entitled to any thing by his motion. The first objection is, as to the supposed variance between the record of the trial in the Court in which the alleged perjury took place, and the present indictment. In the indictment it is called "the Court of the King's Palace AT *Westminster*;" when the proceedings of the Court were produced, they appeared to be the proceedings "of the Court of the King's Palace OF *Westminster*." This, it is contended, is a fatal variance. Now although the king has more than one palace AT *Westminster*, yet he has but one palace at which he has a Court. I should have thought that a sufficient

(*a*) Vide the judgment of *De Grey*, C. J., in *Bushby* v. *Watson*, 2 Sir W. Bl. 1050.

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answer to the objection; but however, the industry of my Brother *Bayley* has found an act of parliament which puts this matter out of all doubt. That act is not printed in the statutes at large. It is the 28 *Hen.* 8. c. 12. and the title of it is, "An act declaring the limits of the King's palace of *Westminster*." The act recites, that the King's palace of *Westminster* was in utter ruin, and that the King had bought of the Archbishop of *York* a mansion, palace, and house; and then it provides and enacts, that all the soil, ground, and buildings which his Majesty had purchased of the Archbishop of *York*, and also the soil of the antient palace, shall be the King's own Palace at *Westminster*, and is from thenceforth to be taken, deemed, called, and named the King's Palace AT *Westminster*. Therefore it is quite clear, that the King's Palace OF *Westminster* and AT *Westminster*, are the same. I apprehend that the purchases there alluded to were made of Cardinal *Wolsey*, and that the palace was *Whitehall*. The second objection is, that the indictment alleges that the cause in the Court below came on to be tried, and was then and there tried by a Jury of the county in due manner taken and sworn for that purpose. Now upon referring to the record of the Court below, it does not appear, certainly, that the cause was tried by a Jury of any county, much less that it was tried by a Jury of the county of *Middlesex*; for the words are, "that the Jury came of the neighbourhood of *Westminster*." Therefore, if even all the Jury were *Middlesex* men, still they would not be a Jury of that county; but we are of opinion that the words "of the county" may be rejected as surplusage, and then the allegation will stand, "that the cause came on to be tried by a Jury in due manner taken and sworn." That is the substance of the allegation, and it was certainly tried by a Jury in due manner taken and sworn from the neighbourhood of *Westminster*. We therefore think, that these supposed variances ought not to prevail, and that the verdict ought not to be disturbed. Certainly at the trial, I was disposed to yield to one of the objections, but I am glad I did not, for if there had been

an acquittal, and a subsequent indictment preferred, though the variance did not really exist, the defendant might plead it in bar, and so far the public justice of the country might be defeated. I do not often yield in favor of trifling objections, upon indictments for perjury, by reason of the serious consequences which must follow, if I should be mistaken.

Rule refused.

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WHITELEGO *v.* RICHARDS, Gent. (In Error.)

*Saturday, June 7.*

Declaration in case against a clerk of the Insolvent Debtors' Court, for wrongfully, maliciously, falsely, and unlawfully making out an order, purporting to be an order of that Court, for the discharge forthwith of an insolvent debtor, who was adjudged by the Quarter Sessions to be detained in custody for two years, at the suit of plaintiff, with an averment that the Insolvent Debtors' Court did not pronounce any such order, or give any authority to the defendant to write, make out, or issue the same, whereby the prisoner was discharged forthwith, and by means whereof plaintiff was injured, and had lost all means of enforcing payment of the debt and costs due to him from the prisoner. Error being brought on the judgment of C. P.:—Held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that Court until set aside, and that the declaration was not demurrable for not averring that the supposed order was in fact set aside.

CASE against the defendant, as clerk of the Insolvent Debtors' Court, for wrongfully, falsely, maliciously, and unlawfully making out and issuing an order, purporting to be an order of the Insolvent Debtors' Court, for the discharge forthwith of a person named *Strettell Chorlton*, who was adjudged by the *Lancashire* Sessions to remain in custody for two years, at the suit of the plaintiff, whereby (*Chorlton* having been discharged forthwith accordingly) the plaintiff was deprived of the means of recovering the debt and costs due to him from the prisoner. On demurrer to the declaration, in the Court of Common Pleas, judgment was given for the defendant (*a*), and error was brought in this Court on that judgment.

The case was argued on a former day by *Campbell* for the plaintiff, and *Talfourd* for the defendant. On the part of the plaintiff, the authorities cited were *Com. Dig.* tit. *Action for Misfeasance*, A. 1. For *Negligence*, A. 2. For *Deceit*, A. 6. *Fitzh. N. B.* 97. C. D. *Smith* v. *Winford* (*b*),

(*a*) Vide 3 Brod. & Bing. 188, where the pleadings are set out at length; but there the word "maliciously" is omitted.

(*b*) Lutw. 96.

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*Bernardiston* v. *Some* (a), *Lane* v. *Cotton* (b), *Douglas* v. *Yallop* (c), *Schinotti* v. *Bumsted* (d), *Harman* v. *Tappenden* (e), *Slipper* v. *Mason* (f), and *Cooke* v. *Champneys* (g).

THE COURT took time to consider the case, and judgment was now delivered by

ABBOTT, C. J.—This was a writ of error on a judgment of C. P., in an action on the case. The judgment was in favor of the defendant, and the plaintiff below is also plaintiff in error. The declaration alleges in substance, "that defendant being clerk of the Court for relief of insolvent debtors, and intending to injure plaintiff, and to cause *Strettell Chorlton* forthwith to be discharged from custody, without paying or satisfying the plaintiff's damages and costs, and to deprive him of the means of recovering the same, without any authority from the Court for relief of insolvent debtors, wrongfully, maliciously, falsely, and unlawfully, made out an order, purporting to be an order from the Court for relief of insolvent debtors, entitled "In the matter of the petition of *Strettell Chorlton*, a prisoner, in actual custody in the castle of *Lancaster*, seeking the benefit of the act, passed for the relief of insolvent debtors," and directed to the keeper or gaoler of the said gaol or castle, and purporting thereby, that the said Court for the relief of insolvent debtors, did order that the prisoner should be discharged from custody as to the plaintiff, at whose suit the prisoner was detained in the custody of the said keeper or gaoler, whereas in truth, and in fact, the Court for relief of insolvent debtors did not at any time pronounce any such order, or give any authority to the defendant to write, make out, or issue the same, by means whereof the said order being exhibited to the keeper of the said gaol, *Strettell*

(a) 2 Lev. 114.
(b) 1 Salk. 17.
(c) 2 Burr. 722.
(d) 6 T. R. 646.
(e) 1 East, 555.
(f) 2 Ld. Raym. 788.
(g) 2 Stra. 901.

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*Chorlton* was thereupon forthwith discharged from custody, and suffered and permitted to go at large wheresoever he pleased, against the will of the plaintiff; and that *Strettell Chorlton* did then and there go from and out of such custody wheresoever he pleased, the said damages and costs then and still being and remaining wholly unsatisfied to the plaintiff, by means whereof the plaintiff hath been greatly injured, and hath lost all means of enforcing payment from *Strettell Chorlton* of the damages and costs aforesaid." This may be taken as the substance of all the counts in the declaration. But it further appears by some of them (to which it is not necessary to refer with particularity), that *Chorlton* had been brought up before the Justices at the Quarter Sessions for *Lancashire*, and by them adjudged to remain in custody for the space of two years, at the suit of the plaintiff, before he should be discharged. In the argument before us, some authorities were quoted to shew that an action on the case may be maintained against a sheriff's officer for falsity or misconduct in his office, whereby a party sustains special damage; and in this case the damage is plainly shewn by the loss of the means of enforcing the payment of the debt and costs in an action against the gaoler or sheriff. It is not necessary to repeat the authorities which were quoted, because the general principle is not controverted. But on the part of the defendant it was insisted, that the order mentioned in the declaration must, in this case, be understood as the act or order of the Court, although the order might not be conformable to the words actually pronounced by the Court, and that it should be so understood until set aside, and consequently that the action could not be maintained without an averment that it had been in fact set aside. It is not necessary to consider whether this consequence would follow ultimately from the premises, assuming the premises were correct, for we are all of opinion that the premises are incorrect, and we think that in this declaration the instrument in question cannot be understood to be the act or order of the Court. The in-

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tention of the defendant in writing out, making and issuing the order, is charged to be wrongful and malicious, and there is a positive and formal averment of fact, that the Court did not pronounce any such order, because the Court gave no authority to the defendant to write, make out, or issue the same. Whether this allegation can or cannot be proved, or in what manner it can be proved, is quite a distinct matter, and with which we have no concern at present. It is true the instrument is called an *order*, and purporting that the Court did order the discharge of *Chorlton*; but looking at the whole declaration, and adverting to the allegation which has been introduced, we think that the word "order," as here used, must be understood to denote the *form* only. Thus the statute 45 *Geo.* 3. c. 89, against forgery, mentions the forging of any deed, will, bond, bills of exchange, bank notes, and many other instruments; and the legislature must in this statute, and in many others passed on the same subject, be understood to mean those instruments which are the *subjects* of forgery, and not such as are in *form* only instruments of the description there mentioned. The word "order" must be understood in the same sense; and this is perfectly conformable to the common language and understanding of mankind. For these reasons we think the judgment should be reversed.

Judgment reversed.

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*Monday, June* 9.

## The KING *v.* The Rev. W. I. JOLLIFFE, Clerk.

An immemorial custom for the steward of a manor to *nominute* the jury, to serve on the court-leet at the election of the mayor of a borough is good in law.

Twenty years usage, uncontradicted, is cogent evidence for the jury to presume that such a custom is immemorial.

INFORMATION, in the nature of a quo warranto, calling on the defendant to shew by what authority he claimed to be mayor of the borough of *Petersfield*. At the trial before *Burrough*, J. at the *Winchester* Summer As-

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sizes, 1822, the material issue on the record was, whether there was in the borough an immemorial custom for the steward of the manor to nominate the Jury, who were to serve upon the court leet, at the election of the mayor of the borough. The evidence in support of the custom did not extend beyond the last twenty years, and no evidence in contradiction was offered. The learned Judge thought that such evidence, uncontradicted, was cogent to support the custom, and that the custom itself, so proved, was good in law; and the Jury found for the defendant.

*Pell*, Serjt. in *Michaelmas* Term last, obtained a rule nisi for a new trial, or to enter a verdict for the Crown, non obstante veredicto, on two grounds, first, that the custom was not sufficiently proved; and second, that the custom itself was bad in law.

*Scarlett*, *Adam*, and *C. F. Williams*, on shewing cause, were desired by the Court to confine their argument to the second point, upon which they contended, that by the very nature and constitution of the court leet, which was originally derived from the sheriff's torn, and in which it was the duty of the sheriff, as the judge, to nominate the Jury, the steward, being the judge of the court leet, stands precisely in the same situation with relation to that court, as the sheriff does to the torn. His duties and responsibilities are the same, and he is no more bound to summon the Jurors previous to holding the leet, than the sheriff is to summon the Jury to the torn. All the resiants are bound, and are presumed to be present at the leet, and therefore there is no necessity for any previous summons, the steward being competent, in this respect, to act both as judge and officer. He is judge to execute the duties incident to the office of steward, and officer to nominate the Jury. It is true that the bailiff may be the person to summon the Jury, but the steward is to nominate the persons who shall be summoned. They cited 2 *Hen.* 4. c. 9. 1 *Rich.* 3. c. 4.

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3 *Hen.* 8. c. 12. *Morgan's* case (*a*), *Crane* v. *Holland* (*b*), and *Com. Dig.* tit. *Viscount* (C. 1.)

*Pell*, Serjt., *Gaselee*, *Coltman*, *Merewether*, and *Carter*, contrà. The supposed analogy between the sheriff's torn and the court leet does not apply, because the sheriff is a public officer, and has public duties to perform, and a public jurisdiction to administer; whereas the steward of the leet is a mere private agent, having only a local and personal franchise to exercise. But even the sheriff has not, per se, authority to nominate the Jury. It is the duty of the steward to order his bailiff "to make a panel;" in other words, to summon a Jury, and the duty of the bailiff to obey that order; and, consequently, that is the only legal mode of appointing the Jury. By the common law it is clear from many authorities, and from universal practice, that the bailiff is the proper person to return the jury process, and the custom in this case being contrary to this rule, is illegal, and cannot be supported. They cited *Viner's* Abridgment (*c*), *Grisley's* case (*d*), *Rex* v. *Bingham* (*e*), 1 *Rich.* 3. c. 4. the Year Book of 7 *Hen.* 6. b. 12. 13 *Edw.* 1. c. 13. 1 *Edw.* 4. c. 2. 3 *Hen.* 8. c. 12. 1 *Eliz.* c. 17; and *Hale's* Commentary on *Fitzh. N. B.* 188. C. note c. 2 *Hawk. P. C.* c. 10. s. 15. p. 93. *Wood* v. *Lovatt* (*f*), *Scrogg's*, *Sheppard's*, *Kitchin's*, and *Jacob's Court-leet*, &c.

Abbott, C. J.—I am of opinion that this rule ought to be discharged. There is no ground for that part of it which applies to a new trial, because upon the evidence, uncontradicted and unexplained, the learned Judge did right in directing the Jury that the evidence so given was cogent ground to warrant them in finding in favour of the custom. We must therefore assume, that by the immemorial custom of this court-leet, the steward has been in the habit of

(*a*) 8 Mod. 300.
(*b*) Cro. Car. 138.
(*c*) Vin. Abr. tit. Court leet (y).
(*d*) 8 Rep. 38. b.
(*e*) 2 East, 308.
(*f*) 6 T. R. 511.

pointing out to the bailiff the names of the persons who are to be summoned to serve on the Jury. It is true that if an usage be contrary to the general principles and rules of law, however long it may have prevailed, still if it is presented to the attention of a Court of law, it must be declared void. We are therefore to see whether there is any thing in this usage contrary to the known principles and rules of law. I adopt very much what was addressed to us by the defendant's counsel, as to the ancient practice in the sheriff's torn, and the analogy existing between that court and the court leet, namely, that in ancient times all persons attended, and were bound to attend the torn without any previous summons. In ancient times many did so attend, and it was not until more modern times that the practice obtained for the sheriff's officer to summon the Jury. Here the question arises as to the grand inquest, and probably this ancient practice existed with respect to that also as to the sheriff's torn. In ancient times the servants of the lord and others usually attended the leet, without any special summons for that purpose, and the Jury was composed of the persons who happened to be in attendance; but if such persons did not attend, I see no reason why the steward should not give directions to his bailiff to take care that certain persons should be in attendance at the court. Some acts of parliament have been referred to, as being inconsistent with this practice. The first is 2 *Hen.* 4. c. 9; and by that statute it appears that a practice had crept in of naming persons to the Justices to serve on the Grand Jury, without being returned by the sheriff. This was found to be very inconvenient, and it was therefore enacted, "That no indictment shall be made by any such persons, but by inquest of the king's lawful liege people, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs before made, by any person, of the names which by him shall be impannelled, except it be by the officer of the sheriffs or bailiffs sworn and known to make the same;" and

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then it describes the qualifications of such Jurors, and subjects the sheriffs to a penalty of forty shillings for any neglect of duty in this respect. Suppose then that the bailiff returns to the sheriff persons not duly qualified according to this statute, what is the sheriff to do? Is he to take them, and thereby subject himself to the penalty of forty shillings, or is he to name other persons properly qualified to serve? I have no doubt that the proper course for the sheriff to adopt, would be to reject the names of unqualified persons, and direct the names of other persons to be inserted who are qualified. Allusion has also been made to the 3 *Hen.* 8. c. 12; and the mischief there recited is, "the untrue demeanor of sheriffs and their ministers in the summoning persons to serve on the Grand Inquest;" to remedy which it is enacted, "that all panels to be returned, that shall be made and put in by every sheriff and their ministers, before any Justice of gaol delivery, or Justice of Peace, in their open Sessions, shall be reformed by putting to and taking out of the names of the persons which so be impanelled by every sheriff, and by discretion of the same Justice before whom such panels shall be returned: And that the same Justice and Justices shall command every sheriff and their ministers, in his absence, to put other persons in the same panel by their directions; and that the same panels so reformed by the said Justices be good and lawful." This is an authority given by the legislature to the Justices of gaol delivery, or Justices of the Peace, to do what I think the sheriff in his torn might have done, to avoid mischief either to himself or the public. In the case of *Crane* v. *Holland* a writ of error was brought in K. B. on a judgment in *Northampton*; the Court there was held before the mayor and two bailiffs; the venire facias upon the issue was awarded to the two bailiffs to return a Jury before the mayor and bailiffs, which being returned, and judgment given, error was assigned, "because the bailiffs, being Judges of the Court, could not also be officers to whom process should be directed, there being no custom that can maintain

any to be both officer and judge;" but this Court said that they might be officers of the Court for one purpose, and judges of it for the other, and therefore over-ruled the objection. A passage was also cited from 2 *Hawk. P. C.* c. 10. s. 15. p. 93, in which it is said, "that a sheriff is a judge of record, and may impose a fine on all such as are guilty of any contempt in the face of the Court; also there seems to be no doubt but that he may impose what reasonable fine he shall think fitting upon a suitor refusing to be sworn, *or upon a bailiff refusing to make a panel,*" &c. It was inferred from this, that in the Sheriffs' Court it is the duty of the bailiff not merely to make out the panel, but to summon and return the Jury. But no such inference can be drawn from this passage, because if the sheriff had directed the bailiff to make out the panel, and he neglected so to do, or had not summoned such persons as he was ordered, the sheriff might require him to put such names into the panel as he thought proper, and require that they should be returned. Full effect therefore may be given to these expressions, without construing them in the manner contended for. Then if we go through the other parts of the case, we shall find the same principle prevailing. In executing a writ of inquiry the sheriff is the judge, and there is no doubt he may name the Jury who are to assess the damages. We all know that he is both judge and officer; he is judge to assess the damages, and sheriff to summon the Jury. In the case of a re-disseisin the same thing takes place. Looking then to the whole of this case, can we say that this custom is contrary to any known rule of law? It may be true that the common practice is the other way, but that does not make the custom unlawful. The argument resolves itself into this, that because it *may* be done in another form, therefore it cannot be lawfully done in this. That is the whole gist of the argument; but I think if we were to draw any such conclusion, it would neither be conformable to good logic nor sound law. Looking to the principle of law, and the practice in various instances, it does not follow that because

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this may be lawfully done one way, it must necessarily be done in that way. Upon the whole I think there is nothing in this custom repugnant to any known rule of law, and therefore this rule must be discharged.

Holroyd, J.(a)—I see no reason for disturbing the verdict in this case. The custom here relied upon does not appear to me to be void in law. The more general practice undoubtedly is for the bailiff to summon the Jury in the first instance; but here an immemorial custom to the contrary has been proved, and there are several authorities in support of such a custom, both decided cases and acts of parliament, which have already been pointed out. The case of *Crane* v. *Holland* seems to me to be decisive of the present case, and I think in conformity with that case we are bound to hold this custom good in law.

Best, J.—We are not called upon in the present case to decide what is the general law upon this subject. The question before us is narrowed to this—"Is this particular custom good in law, or is it in itself illegal, and therefore void?" There are two circumstances in favor of the custom; first, that it is proved to have existed immemorially; and, second, that no case has been cited which shews it to be illegal. The general practice undoubtedly has been such as it is described by *Scroggs* and the other writers mentioned; but they describe the *general* practice only, and that cannot supersede a particular custom, if the latter be properly established. In addition to the evidence of immemorial usage, this custom is certainly supported in express terms by the case of *Crane* v. *Holland*. It is said that the steward is an interested person, and therefore incompetent to appoint the Jury; he may perhaps have some very remote interest in selecting some, and excluding others from serving on the Jury; but if he were on that account to be held incompetent, the same rule would prohibit every judge ap-

(a) *Bayley*, J. was absent.

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pointed during the pleasure of the crown from imposing a fine upon any the greatest offender brought before him. The statute 1 *Eliz.* c. 17. s. 10. is strongly in favor of this custom, because it expressly empowers the steward to nominate other Jurors in the room of such as may appear to have neglected their duty, and it is impossible to conceive that he should have power to name the second Jury, if he had not as a matter of course authority to name the first. I am of opinion that this is a good custom.

Rule discharged.



CATTARNS *v.* PLAYER and WIFE.

*Wednesday, June 11.*

Husband and wife being arrested, the latter is discharged out of custody on filing common bail, and plaintiff declares against husband alone:—Held, irregular.

IN this case husband and wife were arrested on bailable process; the wife was discharged on filing common bail, and plaintiff declared against husband the alone. Rule nisi having been granted for setting aside the declaration for this irregularity,

*F. Pollock* shewed cause, and contended, that the wife being discharged out of the actual custody of the Marshal on filing common bail, she was to be treated as no party to the proceedings, and therefore that declaring against the husband alone was no irregularity.

*Chitty*, contrà, was stopped.

PER CURIAM.—The wife is virtually and in the eye of the law in custody, though only common bail have been filed. She is in Court; and if you arrest two, and declare against one only, your proceedings are irregular.

Rule absolute.

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*Wednesday, June 11.*

General demurrer to part of a declaration, and plea of the general issue to the rest, must be *delivered* to plaintiff's attorney, and not *filed* with the clerk of the papers; otherwise a nullity.

## Dymock v. Stevens.

Assumpsit by the indorsee against the drawer of a bill of exchange, with the usual common counts. The defendant demurred generally to the first count, and pleaded the general issue to all the other counts, but instead of *delivering* he *filed* the demurrer and general issue with the clerk of the papers, upon which the plaintiff treated the proceedings as a nullity, and signed judgment.

*Espinasse*, on a former day, obtained a rule nisi to set aside the judgment for irregularity, with costs.

*Archbold* now shewed cause, and contended, that by the practice of the Court, a general demurrer should be *delivered* to the plaintiff's attorney, and not filed with the clerk of the papers; if filed with the clerk of the papers, it was a nullity to all intents and purposes.

The Court, upon consulting with the clerk of the papers, said, that certainly such was the practice.

*Archbold* further urged, that by the practice, if a defendant pleads the general issue to part of the declaration, and demurs generally to the rest, both demurrer and general issue must be *delivered* to the plaintiff's attorney, and not filed.

The Court assented to this; but it being admitted on both sides that the first count of the declaration was clearly defective, they suggested that it would be better for the defendant that the rule should be discharged without costs, he consenting that the plaintiff should amend gratis; but the defendant declining this, the

Rule was made absolute, with costs.

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*Wednesday, June 11.*

SIMSON and Others *v.* J. INGHAM, Heir, and TAYLOR and Others, Devisees of B. INGHAM, deceased.

*A.* & *B.* & *Co.*, country bankers, have a cash account with *C.* & *Co.*, *London* bankers, who are in the habit of transmitting to the former monthly statements of mutual debits and credits. *A.* dies, leaving a large balance due from himself and partners to *C.* & *Co.*, who, for two months afterwards, make no alteration in their *own* books as to the mode of keeping the account, but continue it as before. In the interval, money is transmitted to *C.* & *Co.* from the country bank, sufficient to pay off the balance due from the firm at the time of *A.*'s death. During the two months, no accounts are transmitted to the country bank, but at the end of that time, two separate accounts are sent, one called the old account, made up to the death of *A.*, without giving credit for the money received since his death, in liquidation of the balances at that time due from the firm; and the other called the new, comprising the two months, giving credit for the sums received during that period. In an action by *C.* & *Co.* on a joint and several indemnity-bond, given by *A.* & *B.* against the heirs of *A.*, for the balance due at his death:—Held, that *C.* & *Co.*, by continuing their own private account against *A.* & *B.* for two months after the death of *A.* as theretofore, were not estopped from suing his heirs.

DEBT on bond. At the execution of a writ of enquiry, before *Abbott*, C. J. at the *London* adjourned Sittings after *Easter* Term, 1822, the amount at which the damages were to be assessed, was referred to the arbitration of a Gentleman at the Bar, who awarded to the plaintiffs the sum of 13,845*l.* 10*s.* 6*d.* and a verdict was entered for that amount. In *Michaelmas* Term last, a motion was made on the part of the defendants, to reduce the damages to one shilling, when the Court ordered the award to be put into a special case.

The following facts were stated on the face of the award: On the 19th *October*, 1808, *Benjamin* and *Joshua Ingham*, Bankers, at *Huddersfield*, executed a bond to *P. C. Bruce*, *G. Simson*, *R. Stephenson*, and *T. Freen*, their corresponding bankers in *London*, by which they jointly and severally bound themselves in the sum of 20,000*l.* to the obligees, to remit money for the payment of bills, which the latter should accept, and the re-payment of money which the obligors should advance, in discounting the obligors bills, or the bills of any other persons associated with them in their business, whether the obligees were or were not associated with any other persons in the same, or any other firm. From the date of the bond, until 1st *January*, 1809, the *Huddersfield* Bank was carried on by the obligors alone, but on that day *I. Ikin* was taken into the firm, and it so continued until 14th *September*, 1811, when *B. Ingham* died. The two survivors carried on the bank until *January*, 1814, when *J. Ingham* died. From the time *Ikin* became partner

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until *J. Ingham* died, the firm was called *B.* and *J. Ingham* & *Co.* The obligees carried on business until 31st *December*, 1808, when *Stephenson* retired. The other three continued by themselves until 1st *January*, 1811, when they took in *H. Mackenzie*, and it was continued by those four until the death of *J. Ingham*. During the latter period the firm was sometimes called *Bruce, Simpson, & Co.*, and sometimes *Bruce, Simpson, Freen, & Co.* The house of *Bruce & Co.* was in the habit of sending to the *Huddersfield* Bank, monthly statements of their accounts. The last statement sent previous to the death of *B. Ingham*, was for *August*, 1811, and was sent on 11th *September*, in that year. The balance then due in favour of *Bruce & Co.*, was 23,671*l.* 3*s.* 2*d.* No alteration in the account was made in the books of *Bruce & Co.* immediately on the death of *B. Ingham*, but during the residue of *September*, and part of *October*, the remittances made by the *Huddersfield* Bank, and the payments made by *Bruce & Co.* on their account, were entered in continuation of the former account. The remittances and payments during that time were nearly equal, and both far exceeded the balance due at the death of *B. Ingham*;—and, if by having thus continued the account, *Bruce & Co.* are to be considered as having made an election from which they were not at liberty to depart, and bound to apply the earliest remittances in discharge of the former balance; the damages should be only nominal. Before, however, any account was transmitted to the *Huddersfield* Bank, subsequently to that of *August*, *Bruce & Co.*, in consequence of communication with their solicitor, opened a new account in their books, and in that inserted all the remittances and payments made subsequently to the death of *B. Ingham*, striking them out of the former account, and retaining there only the bills for which as before stated credit had been given, but which were dishonored; and on 13th *November*, 1811, they transmitted to the *Huddersfield* Bank statements of two accounts, each of which, instead of comprising as formerly the transactions of a single month,

contained those of two, namely, *September* and *October*; no account of *September* separately having ever been sent. From this time the old and new accounts were kept separate in the books of *Bruce & Co.*, the addition to the former being little, if any thing, more than the interest at the end of every six months, except in *July*, 1813, when a transfer was made from the new account to the old, of 15,537*l.* 18*s.* 10*d.* which reduced the balance of the old to 10,000*l.* Statements of the two accounts, with the respective letters *o*|*a* and *n*|*a*, continued from time to time to be transmitted by *Bruce & Co.* to the *Huddersfield* Bank, and examined and ticked in the usual manner, except that the statement of the old account was only sent half-yearly. The *Huddersfield* Bank did not appear ever to have objected to the accounts being kept separately by *Bruce & Co.*, although in their own books they kept one account only. The question for the opinion of the Court is, whether the arbitrator has properly assessed the damages; if the Court think that he has, the verdict is to stand; if otherwise, the damages are to be reduced to one shilling.

*Campbell*, for the plaintiffs, contended, that there was no pretence for reducing the damages, and having cited *Manning* v. *Western* (*a*), and *Cox* v. *Troy* (*b*), was stopped by the Court.

*F. Pollock*, for the defendants, contended, that the plaintiffs', continuing the account in an unaltered state, from the day of *B. Ingham*'s death, till the middle of *November*, was an election by them of the mode in which they chose to apply the payments, and having once made that election, they were not afterwards at liberty to deviate from it. The present defendants therefore were not liable for the arrears; the plaintiffs might have discharged those arrears by continuing to carry all the payments to it; but they declined so doing, and therefore the defendants were in the character

(*a*) 2 Vern. Ch. C. 606. (*b*) Ante, vol. i. p. 38.

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of mere sureties for the debts, which might accrue subsequent to the death of *Benjamin*. He relied upon *Clayton's* case (a), and *Bodenham* v. *Purchas* (b), as express authorities.

BAYLEY, J. (c).—There are three general rules applicable to cases of this nature, which it is necessary to keep in view, first, that ordinarily the party who pays in money, has the liberty of applying it specifically to whichever of two accounts he chuses, either the old, or the new; second, that where he makes no election, but pays the money in generally, the party to whom it is paid becomes entitled to the same liberty, unless the exercise of it is calculated to work injustice; and third, that when two partners are jointly indebted, and one dies, and the survivor keeps on an account with the creditor, who unites the two accounts, then subsequent payments must be applied in liquidation of the old debt. In this case, one of the partners dies in *September*, 1814, and the survivor continues his transactions with the creditors. No statement of accounts is sent to him at the end of *October*; and if there had been, and if in that statement the account had been kept in the same form since the death, as it had been before it, undoubtedly he would have been bound to apply all subsequent payments in liquidation of the original joint debt. At the end of *November*, a statement of accounts is sent in, in which the joint account is made up to the end of *September*, and after that time the accounts are kept separately; as the old, and the new. It is contended, in argument, that the creditors had no right thus to divide the accounts, and that they are bound by the entries in their books, to treat the entire account as one and the same. I, however, am of opinion that they are not so concluded by those entries; they were private entries made by themselves, and altogether unknown to the surviving partner of the *Huddersfield* Bank, and there-

(a) 1 Meriv. 572.
(b) 2 B. & A. 46.

(c) *Abbott*, C. J. left the Court to go to Guildhall.

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fore I think they cannot be considered as conclusive against the plaintiffs. I am not aware that any case has ever gone that length, nor can I anticipate so extraordinary a decision, in future. Then, as the accounts were kept separately after the death of *Benjamin*, and as the plaintiffs were not concluded by their private entries unknown to the *Huddersfield* Bank, the former were still at left to their choice to which account they would place these payments. Nor is any injustice thereby worked to the heirs of *Benjamin Ingham*; they were at liberty, and ought to have inspected the accounts, and then they might have objected to the form of them. But they do not take this precaution; they make no objection to the form of the accounts, and must be presumed, therefore, to have acquiesced in it, and in that view of the case, the plaintiffs were clearly at liberty to carry the payment to the new accounts as they did. I am therefore of opinion, that the amount of damages was justly estimated by the arbitrator.

HOLROYD, J., concurred.

BEST, J.—I think *Clayton*'s case is very distinguishable from the present. The principle laid down there went only to regulate the mode of payment by the debtor, and not the application of the money by the creditor, and therefore does not govern the present case. The question here is, "when is the creditor bound to make an application from which he cannot afterwards deviate?" Is he concluded by his first inclination, or intention? Certainly not; such a proposition would be too strong. Are the first entries he makes in his books binding for ever? certainly not; he may find reason to disapprove of, and alter them, and he is at liberty to do so, until they are made known to, and approved by, his debtor. In this case they were private entries, unknown to the defendants; the plaintiffs see reason to alter them, and they clearly had the liberty to do so.

Judgment for the plaintiffs.

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*Thursday, June 12.*

A latitat is sued out against *A.*, and served upon *B.*, who files common bail, as being sued in the name of *A.*, and a declaration is delivered to him which is returned to plaintiff's attorney. An alias and a pluries are then severally sued out against *A.*, and he is served with the latter:—Held, that the pluries was regularly sued out, though the original writ was served upon *B.*, and a declaration delivered to the latter.

## CLARKE *v.* JOHNSON.

ON shewing cause against a rule for setting aside a pluries writ of latitat for irregularity, it appeared that the original writ was sued out against the defendant *Thomas Johnson*, but was served upon his father *John Johnson*. Common bail was duly filed for "*John Johnson*, sued by the name of *Thomas Johnson*," and a declaration was delivered against "*Thomas Johnson*;" which was returned to the plaintiff's attorney. The plaintiff afterwards sued out an alias and a pluries against "*Thomas Johnson*," with a copy of the latter of which the defendant had been served; and the question was, whether the original writ having been served upon *John*, and the declaration delivered to him, any subsequent writ in the same action could regularly be founded upon it, and served upon the defendant *Thomas*.

BAYLEY, J. (*a*)—These proceedings are perfectly regular, and the pluries is a proper continuance of the original latitat. *Thomas* was never served with the original writ, but non est inventus was returned to it. Then the plaintiff was warranted in suing out the alias upon that, and the pluries upon the alias, if the intermediate writ could not be served upon *Thomas*. The name of the defendant was correctly described from the first; but the wrong person was served with the process. Now the right person has been served, and the writ properly describes him.

Rule discharged (*b*).

(*a*) The only Judge in Court.

(*b*) Vide *Toms* v. *Powell*, 7 East, 536.

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Thursday, June 12.

Where a mansion-house was sold at public auction, without any stipulation on the part of the vendor that the fixtures were to be taken and paid for separately, and the vendee, who had paid the purchase-money, entered into possession under a conveyance:—Held, that the fixtures passed to the vendee, and were not the subject of trover:—Held also, that a demand of, and refusal to deliver, *fixtures*, would not entitle the vendor to such articles left in possession of the vendee, as appeared to be moveable goods and chattels.

## COLEGRAVE, Esq. *v.* DIAS SANTOS, Clerk.

TROVER for certain stoves, grates, goods, and chattels. Plea, Not Guilty. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after last *Michaelmas* Term, it appeared that on 6th *August*, 1819, defendant purchased from plaintiff, at a public auction, a mansion-house, and lands, called *Downsell Hall*, in *Essex*, for the sum of 14,220*l.*, and, on 30th *December* following, completed the purchase, and entered into possession. The principal part of the articles in question were fixtures belonging to the house, and were in it both at the time of the sale, and when the defendant took possession. No mention whatever was made of fixtures in the printed particulars of sale, nor was any agreement upon the subject of fixtures ever entered into between the parties. On 8th *July*, 1820, the plaintiff's attorney wrote to the defendant's attorney, making a claim for the further sum of 125*l.*, as and for the value of the *fixtures*, which was unnoticed till 21st *August*, 1821, when there was a refusal to deliver, and on 17th *October* following an inventory of the goods was handed to the defendant's attorney, entitled "An inventory of the *fixtures* in the house and offices at *Downsell Hall*," which enumerated all the articles sought to be recovered, consisting chiefly of bells and bell-pulls, stoves, grates, blinds, shelves, coppers, a water-butt, and other articles of the same kind. On 21st *June*, 1822, the defendant's attorney signed the following written admission:—

"I hereby undertake, on the part of the defendant, to admit at the trial of this cause the bare facts of the demand on the part of the plaintiff, and refusal on the part of the defendant, on the 23d day of *March* last, to deliver the fixtures specified in the foregoing inventory, without admitting such inventory to be an inventory of the fixtures in the house and offices at *Downsell Hall*, or the right of the plaintiff to maintain the present action, and without prejudice to

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any other legal objection which the defendant may be entitled to take."

On these facts it was contended for the defendant, that the action could not be supported. It was brought to recover the value of *fixtures*, which, being part of the freehold, had passed, with the premises to which they were attached, to the defendant, and could not at any rate be recovered in an action of trover; and *Wynne* v. *Ingleby* (a) was cited. The learned Judge over-ruled the objection, and the plaintiff had a verdict for 80*l.*, with liberty to the defendant to move to enter a nonsuit.

*Gurney*, in *Hilary* Term last, obtained a rule nisi accordingly, and

*Marryat* and *Platt* now shewed cause. The question is, whether the goods mentioned in the declaration are in their nature such as the vendor of a house can recover from the vendee, or whether the vendee is by law entitled to them as part of the house, and therefore part of his bargain. Some of these articles may indeed be fixtures, strictly speaking, and part of the freehold, but many of them clearly are not. There are among them stoves, bell-pulls, shelves, and water-butts, none of which are permanently attached to the house, or can be considered as part of it, and those therefore are recoverable in an action of trover. [*Bayley*, J. Is that so clear? To whom would such articles pass, to the heir, or the executor?] It is submitted that they would pass to the executor. [*Best*, J. Is not *Wynne* v. *Ingleby* an express decision to the contrary? Has the vendor a right to dismantle a house in order to remove such articles?] They are no part of the original building, and therefore might have been removed in the first instance, and they are certainly such goods as would be liable to seizure under an execution. *Ex parte Quincy* (b). [*Abbott*, C. J. Are you not precluded by the terms of the demand and refusal?

(a) Ante, vol. i. p. 247.

(b) 1 Atk. 477.

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They apply exclusively to *fixtures*, and fixtures are not the subject of an action of trover.] It would be narrowing the admission much within the meaning of the parties, if it were to be construed as applying exclusively to *fixtures* in the strict legal sense of that word. The intention of the parties was to admit the fact of a demand and refusal of the articles contained in the inventory, and therefore in construing the admission it should be taken as if the word "articles" had been used instead of the word "fixtures." It has never yet been decided what species of articles are, and what are not, *fixtures*, and it would be bearing hard upon the plaintiff to conclude him in this instance by the accidental adoption of an equivocal word, against the plain spirit and intent of the parties. The conveyance having been executed does not affect this case, nor vary the intention of those who are parties to it. It seems clear that the plaintiff had no intention to pass these articles as parcel of the freehold, and therefore in justice he ought to be paid their value. Many of them are undoubtedly *moveables* in the fair sense of the word, and to them therefore trover will strictly and properly apply, because the defendant's detention of them is in law a conversion.

*Gurney* and *Storks*, contrà, were stopped by the Court.

ABBOTT, C. J.—I am now perfectly satisfied that the plaintiff is not in a situation to maintain this action, and that judgment of nonsuit ought to be entered. Here is a freehold house sold to the defendant by public auction, and the printed particulars and conditions of sale make no mention of the fixtures, or of their being to be taken at a valuation, which is invariably done where the vendor intends to claim a right to be allowed an extra sum for the fixtures. The rule of law upon this subject, as between the heir and the executor, is strict, and well known and understood, although it may be less decisive and defined as between vendor and purchaser. But upon what principle is it that fixtures

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pass to the heir? Simply this, that they are by law part and parcel of the freehold, and I cannot see any good reason why, upon the very same principle, they should not pass to the purchaser under a conveyance of the freehold by the vendor. Then for those articles which are legally fixtures, the plaintiff having left them in the house when he conveyed it to the defendant, cannot maintain trover, nor can he enter to remove them, because such an entry would be a trespass. The rule upon this point is clearly laid down in *Lee* v. *Risdon* (a), which case fully governs the present, so far as the *fixtures* are concerned. Then it is contended that some of the goods are *moveables*, and that as to them the action may be supported. If they had been proved to have been such, and if as such they had been demanded and refused, the argument would have some weight; but there is no such evidence, and the demand and refusal are expressly confined to fixtures. If there were any moveables in the house, they should have been separately demanded as goods and chattels, but, upon the present evidence, we cannot assume the fact.

BAYLEY, J.—I think we should be guilty of great injustice if we were to allow the plaintiff to retain this verdict. The vendor makes no claim to be paid for fixtures in his conditions of sale, and in the absence of any stipulation for such a payment, he has no right either to remove the articles themselves, or to be remunerated for them; they are part of the original bargain, and as such have already been paid for in the purchase-money of the house, of which they are parcel. If the plaintiff now has a claim for the value of the fixtures, he has also a right, at his own option, to the fixtures themselves; and if so, what is to prevent him from entering the house and pulling them down? But to give him such a right as that would be to arm him with a most unjust and exorbitant power; and after he has once conveyed the house, I am clearly of opinion that he has no

(a) 2 Marsh. 495.

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shadow of title to the fixtures either at law or equity. For all that appears before us, these articles are, in the legal sense of the word, *fixtures*, and for the reasons I have already given, I am of opinion that the present action cannot be maintained.

BEST, J. (a)—I take it to be quite clear, that, without a stipulation for a valuation in the conditions of sale, the timber upon land, and the fixtures in a house, would pass by a conveyance to the vendee (b). In this case there was no such stipulation, and therefore I am of opinion (and certainly no case has been cited to the contrary) that these articles passed to the defendant. It is clear that they would pass to the heir and to the devisee, and why should they not pass to the buyer where a conveyance is executed, and possession transferred? I can see no reason for excepting this case from the general rule. The case of *Lee* v. *Risdon* decides, that for *fixtures* no action will lie; but it is contended, that for *moveables* trover may be supported. I very much doubt that position, generally, but, in the present instance, trover certainly will not lie; for the goods have been demanded and refused as fixtures, and not as goods and chattels.

Rule absolute for entering a nonsuit.

(a) *Holroyd*, J., was absent.
(b) See *Crockford* v. *Alexander*, 15 Ves. 138.

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*Friday, June 13.*

## In the Matter of THOMAS CLARK, JOHN SLEE ISAACSON and JOHN BENJAMIN BROOKES.

The Court struck two attornies off the roll for knowingly permitting an unqualified person to practice as an attorney in their names, for his own profit, contrary to 22 *Geo.* 2. c. 46, and sentenced the unqualified person to be imprisoned for three months in the prison of the Court. The latter being previously a prisoner for debt, was ordered by the Court to be brought up without a day-rule, on a suggestion that he was unable to pay the expence of the day-rule.

A RULE having been obtained, calling on *Clark* and *Isaacson*, two attornies of this Court, to shew cause why they should not be struck off the roll, for having permitted *Brookes* to practice in their names respectively, as an attorney, for his profit, knowing him not to be duly qualified; and calling on *Brookes* to shew cause why he should not be committed to the prison of this Court, pursuant to 22 *Geo.* 2. c. 46. s. 11, the matters alleged in the affidavits on both sides, were referred to the Master to make his report thereon. The Master being now called upon for his report, stated the circumstances which appeared before him in evidence. It was alleged, among other circumstances, that for a considerable time *Brookes* had, under cover of the names of *Clark* and *Isaacson* successively, practised for his own profit, with their knowledge, as an attorney in several causes, and particularly in two of *Gale* v. *Burnel*, and *Johnson* v. *Gray*; that during part of the time, *Clark* had acted as his clerk, receiving a weekly salary of 2*l.* of which entries were made in his account-book; that after *Clark* had quitted his employment, *Isaacson* took possession of the office which had been previously occupied by the former, and permitted *Brookes* to practice in his name, &c.; that part of the rule against *Brookes*, called upon him to pay back to the defendant in *Johnson* v. *Gray*, a sum of 28*l.* 13*s.* obtained from her as her costs in that cause, and to deliver up to her a warrant of attorney given for further costs in the same cause, and to pay the costs of the application; and also to shew cause why, in the case of *Gale* v. *Burnel*, all the proceedings therein should not be set aside, without costs, &c.

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In re CLARK and Others.

*Adolphus* and *Brougham* prayed the judgment of the Court upon the facts disclosed in the Master's report.

ABBOTT, C. J.—The rule in this case embraces several particulars. We shall pronounce our opinion upon the latter part of it, first, namely, that which calls upon *Brookes* to shew cause why he should not pay back to the defendant in *Johnson* v. *Gray*, the sum of 28*l.* obtained from her as her costs in that cause, and to deliver up the warrant of attorney given by her for further costs, and calling upon him to shew cause why the proceedings in *Gale* v. *Burnel* should not be set aside, without costs. We are of opinion, that that part of the rule which applies to the case of *Johnson* v. *Gray*, must be made absolute; but we think that part of it which seeks to set aside the proceedings in *Gale* v. *Burnel*, cannot be made absolute without prejudicing the plaintiff, upon whom no blame attaches. The material parts of the rule are those which affect the two attornies, upon the application to strike them off the roll, and *Brookes*, upon the application that he be committed to the custody of the Marshal. By the terms of the statute 22 *Geo.* 2. c. 46. s. 11. it is declared, "that if any sworn attorney or solicitor shall permit or suffer his name to be any ways made use of upon the account or for the profit of any unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified, and complaint shall be made thereof, in a summary way, to the Court from whence any such process issues, and proof made thereof upon oath, to the satisfaction of the Court, that such sworn attorney or solicitor hath offended therein, as aforesaid, then, and in such case, every such attorney or solicitor so offending shall be struck off the roll, and be for ever after disabled from practising as an attorney or solicitor, and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said Court to commit such unqualified

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person, so acting or practising, to the prison of the said Court, for any term not exceeding one year." By this statute, therefore, if the Court is satisfied that what is here mentioned has taken place, it is the duty of the Court to strike the attorney off the roll, and to commit the unqualified person to prison. It is our duty so to do under the terms of this statute; but independently of the statute, it is equally the duty of the Court to strike an attorney off the roll for misconduct of this description, for if we were to suffer a person to remain on the roll, who has so conducted himself, we should thereby give him a sanction and credence with the world, and enable him to defraud and impose upon the public. The words of the statute are "to the satisfaction of the Court." I disclaim for myself any wish to proceed in a case like this, upon mere suspicion; but we are to ask ourselves this question, (which is not unfrequently asked in summing up a case for the jury), adverting to the evidence before us, are our own judgments satisfied, are our minds convinced that the crime charged has been proved to our satisfaction and conviction? That conviction may arise as well from collateral circumstances as from direct and positive proof. Trying this case by that test, and asking myself this question, the only answer that occurs to my conscience is, to say that my mind is satisfied and my judgment convinced by the circumstances which have been laid before us, that each of these persons, first, *Clark*, and next, *Isaacson*, has been allowing *Brookes* to practice in his name as an attorney for his benefit. Finding that to be the conviction of my mind upon the evidence before me, I do not think it necessary to go through in detail, or comment upon the circumstances disclosed on the one side or on the other; but I am clearly of opinion, and I feel myself bound in the discharge of my public duty to order that the rule be made absolute for striking *Thomas Clark* and *John Slee Isadcson* off the roll of attornies of this Court, and that *John Benjamin*

*Brookes* be committed to the prison of this Court for three months.

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The other Judges concurred (*a*).

*Note.* That *Brookes*, who had been previously confined as a prisoner for debt, was brought up from the King's Bench prison, by an order of the Court, on a suggestion that he was unable to pay the expence of a day rule.

(*a*) In *Hilary* Term last, the Court held, upon this statute, that an attorney who had engaged a certificated conveyancer to conduct his business, and had agreed to allow him one-half the profit instead of a salary, was liable to be struck off the roll, and the conveyancer to be committed to the prison of the Court. In re *Jackson and Wood.*

## MORRIS *v.* JONES.

*Friday, June 16.*

Where the grantor of an annuity assigned a policy of insurance on his own life to the grantee, whereby the latter was enabled to insure the life of the former, at a less premium than he otherwise might have done:— Held, that such assignment was no part of the consideration, and need not have been set out in the memorial, under 53 *Geo.* 3. c. 141. s. 2. the other requisites of that statute having been complied with.

*SCARLETT* had obtained a rule nisi for setting aside the warrant of attorney, given for securing an annuity, and the judgment entered up thereon, on the ground that the memorial did not truly set forth the consideration for the annuity. The annuity in question, amounting to 1483*l.* had been granted in consideration of the sum of 11,000*l.*, which circumstances were set forth in the memorial; but it appeared, that at the time of granting the annuity, the grantor assigned to the grantee, certain policies of insurance on the life of the former, which were at that time worth 1100*l.*, and it was objected that the annuity deeds were void within 53 *Geo.* 3. c. 141. s. 2. for not setting forth this assignment in the memorial.

*Copley*, S.G. on shewing cause, was stopped by the Court.

*Scarlett* and *J. Evans*, contrà, insisted, that the consideration set forth in the memorial, was not the sole con-

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sideration, and therefore the deeds were void. The policies which were assigned, were as much part of the consideration, as the annuity, and therefore ought to have been set out. It was material to set forth the assignment, because the policies evidently formed part of the consideration. They enabled the grantee to insure the life of the grantor, at a less premium than he would be required to pay, if he had to commence an insurance on the life of the grantor, at the time the deeds were executed. They were, in fact, worth 1100*l*. It was true, if the grantor redeemed, he would be entitled to have the policies re-assigned, but it was a rare thing for the grantor of an annuity to redeem. The grantor ought to know the precise terms on which the annuity is redeemable, because he would otherwise be left in great doubt and difficulty unless he has kept a copy of the deed, which is rarely done. [*Bayley*, J.—Under the late statute, it is not necessary to set out the clause of redemption (*a*). *Abbott*, C. J. Many things were thought necessary to be done, when the 17 *Geo.* 3. c. 26, first came under the notice of the Court; but which upon further consideration, were not deemed requisite.] It is of importance that the grantor should know by what means he is to redeem the annuity. In this memorial there is nothing said about the policies of insurance, which it was of the greatest importance to insert. Suppose the grantor became insane, how is his committee to know on what terms the annuity is redeemable? It might as well be argued, that if a man bought a horse and an ass for 100 guineas, that he could state the consideration for the purchase of the ass to be 105*l*. In this view, and many others which might be mentioned, it is of the greatest consequence that the memorial should set out the whole of the consideration whether pecuniary or otherwise. They relied upon *Wasburn* v. *Birch* (*b*), and *Ex parte Ansel* (*c*).

(*a*) See *Yems* v. *Smith*, 3 B. & A. 306.

(*b*) 5 T. R. 472.

(*c*) 1 Bos. & Pul. 62.

ABBOTT, C. J.—I am of opinion that all the requisites of the annuity act have been complied with in this case. The statute is in one view remedial, and in another penal, and although, when the 17 *Geo.* 3. c. 26, (which may, for the purpose of the present question, be considered the same as this), first came under view it was considered remedial only, yet in progress of time, the Court at length considered it both penal and remedial. The 53 *Geo.* 3. c. 141. s. 3, requires, that the memorial shall contain, among other things, the pecuniary consideration or considerations for granting the annuity, and the annual sum or sums to be paid, and then follows a schedule, informing persons how they may draw up their memorial. The consideration, and how paid, is stated thus. "100*l.* paid in money; 500*l.* paid in notes, of the Governor and Company of the Bank of *England*, or other notes or bills of exchange, as the case may be." Therefore it is manifest, that it is the pecuniary consideration, which is required to be truly set out. In the present instance, it is said, that the pecuniary consideration is not truly set out, because the sum of 11,000*l.* alone was not the consideration, but there was in addition, an assignment of a life policy. Now, it is almost the invariable practice of persons who become the grantees of annuities, to insure the lives of the grantors, and in regulating the sum which the grantee can afford to pay to the grantor, regard is always had to the term of life for which the annuity shall endure. That is the point which seems to have been regarded here. This policy was handed over, not as something of present pecuniary value, or as capable of being sold, or intended to be sold, but merely to enable the grantee to insure the life of the grantor at a less rate than he could have done if a policy had been to be effected at that moment. It would be introducing too much subtlety into this act, and imposing great hardships in many instances, if we were to hold that such an assignment as this formed part of the consideration, and ought to be truly set out. If we were to adopt such a construction, we should next be called upon, perhaps, to inquire into the state of the health

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of the particular person, at the time the annuity was granted, and to set aside the deeds because something was done, whereby the life might have been insured at a different rate. I think we cannot set aside the annuity for this objection.

Bayley, J.—The act requires that the consideration, and the annual sum to be paid, shall be truly set out in the memorial. Here the consideration for the purchase of the annuity was 11,000*l.*, and that is truly set out; but the argument is, that this is not the sole consideration. That is not a true representation of the case, because the object of the one party was to buy, and the other to sell the annuity, for 11,000*l.*, which was the sole consideration. It is suggested, that these policies enabled the grantee to insure the life of the grantor, at a less premium. That may be true, but if he had not been enabled so to do, he would have taken care that the sum required to be paid annually, would have been larger than 1483*l.*, thereby making up to him the increased expence of insuring. The annual payment may be smaller by this means, but unless these policies had been assigned, the annuity must have been greater. Looking to the deeds themselves, they do not misrepresent the transaction, because they shew what it really was. I am of opinion, therefore, that in substance all that the act requires has been complied with. The money coming out of the pocket of the grantor and grantee, is truly stated. In substance, the party was stipulating, not for the purchase of a policy, but of an annuity, and the policy was merely a security to repay the principal money if the grantor should die.

Holroyd, J.—I am of the same opinion. I think the sum of 11,000*l.* was truly stated as the sole consideration, and that the policy of insurance was merely ancillary to it, for when the annuity was to be redeemed, then the policy would be returned to the grantor (*a*).

Rule discharged.

(*a*) *Best*, J., was absent.

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## Miller *v.* Caldwell.

*Saturday, June 14.*

In assumpsit for seaman's wages, to which the statute of limitations was pleaded, it was proved that the defendant being applied to for payment, after the lapse of six years, said "I will see my attorney, and tell him to do what is right." *Semble*, this was not a sufficient acknowledgment to take the case out of the statute.

ASSUMPSIT for a seaman's wages. Pleas, non assumpsit, and the statute of limitations. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Michaelmas* Term, it appeared that the defendant was one of the owners of the ship *New Liverpool*, which in *October*, 1811, was preparing for a voyage from *Quebec* to *Newfoundland* and back. The plaintiff was hired by the captain on the 12th of that month, as a seaman for that voyage, and sailed in the *New Liverpool*, pursuant to his agreement, until the 9th *August*, 1812, when she was captured by an *American* privateer. The plaintiff arrived at *Quebec* in *July*, 1813, when he demanded his wages of the owners, who refused to pay them, on the ground that the voyage had not been completed. In *March*, 1817, the defendant paid the mate of the vessel the whole of his wages; on that occasion the mate told him that the plaintiff's wages were unpaid, which the defendant did not deny. In *April*, 1822, the mate called with the plaintiff upon the defendant, then being in *London*, to demand his wages. The defendant then asked the mate if he thought the plaintiff had had any money of the captain. The mate replied, that he had only received a month's advance. The defendant then said, "I will see my attorney, and tell him to do what is right." The plaintiff's demand, however, not being paid, the present action was brought; and the defendant's expressions last-mentioned were relied upon as evidence of an acknowledgment, sufficient to take the case out of the statute of limitations. The learned Judge directed the Jury to find for the plaintiff, with liberty to the defendant to move for a new trial, if the Court should be of opinion that the case was not within the statute.

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*Gurney*, in *Hilary* Term last, obtained a rule nisi, accordingly.

*Rotch* and *Talfourd* now shewed cause. Though the 21 *Jac.* 1. c. 10, has been emphatically called a statute of repose, yet the slightest acknowledgment of the debt has always been held sufficient to bar it, for otherwise great hardship might be imposed upon creditors where accident had prevented them from claiming their debt in due time. Now the defendant's expressions clearly amount to an acknowledgment of the debt. He knew in 1817, and then did not deny, that the plaintiff's debt was unpaid, and when it is demanded in 1822, he says, "I will see my attorney, and tell him to do what is right," having previously enquired whether the man had received any money from the captain. For what possible purpose could he propose to see his attorney, but to know whether he was liable in law, and if he found that he was so, to order him to pay the debt? This was at least a conditional promise to pay, coupled with an acknowledgment that something was due, and that is sufficient to bar the statute. *Heyling* v. *Hastings* (*a*), *Bryan* v. *Horseman* (*b*), *Trueman* v. *Fenton* (*c*), and *Lloyd* v. *Maund* (*d*). But even if the defendant's language was equivocal, either as to the acknowledgment of the debt, or as to the promise to pay, still it should have been left to the Jury to judge of its effect, *Bicknell* v. *Keppell* (*e*).

*Gurney* and *Kaye*, contrà, contended that the cases cited did not govern the present; that the defendant's words amounted neither to an acknowledgment of the debt, nor to a promise to pay, but were in substance an intimation that he should give his attorney instructions to defend the plaintiff's action. They cited *Hillings* v. *Shaw* (*f*), and *Beale* v. *Nind* (*g*).

(*a*) 1 Salk. 29.
(*b*) 4 East, 599.
(*c*) Cowp. 544.
(*d*) 2 T. R. 762.
(*e*) 1 New R. 20.
(*f*) 7 Taunt. 712.
(*g*) 4 B. & A. 568.

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Per Curiam. The present case does not range itself within any of those which have been cited in argument. Sufficient latitude has already been taken by the Courts, in construing equivocal language into an express acknowledgment of a debt, or a positive promise to pay it. We ought not to extend that sort of construction farther, which we certainly must do, if we were to hold that the defendant's words in this case were sufficient to raise a new assumpsit. The rule for a new trial therefore must be made absolute (a).

Rule absolute, on payment of costs.

(a) Vide *Atkins* v. *Tredgold*, ante, p. 200.

## Dally v. Wolferston.

*Monday, June 16.*

A. and B. having dissolved partnership, an award was made between them, by which B. was directed to pay A. a sum certain, and to pay several partnership debts. B. gave a warrant of attorney for securing the money awarded, with a stipulation in the defeazance, that if A. should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. B. became bankrupt, and A. proved his private debt under the commission, and received a dividend thereon. A. was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment, and took out execution on the warrant of attorney, before B. had obtained his certificate:—Held, that A. was not deprived of his remedy by 49 *Geo.* 3. c. 121. s. 8. & 14.

*Marryat*, on a former day, obtained a rule, calling on the plaintiff to shew cause why the judgment signed, and execution taken out on the warrant of attorney given in this case should not be set aside under the following circumstances:—Plaintiff and defendant had formerly been in copartnership in trade, and the partnership being dissolved, certain differences between them were referred to arbitration. An award was made, by which the defendant, who continued to carry on the business alone, was directed to pay the plaintiff a sum of money, amounting to about 1400*l.* and also to pay certain partnership debts. In pursuance of the award, the defendant executed a warrant of attorney, with a defeazance, stating that he was to pay to the plaintiff the balance due to him under the award, with inte-

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rest, and also should indemnify plaintiff against the partnership debts in case they should be demanded of him. These debts were scheduled, and the amount, together with the private debt due from defendant to plaintiff, was about 4000*l.* The warrant of attorney was executed on a 7*l.* stamp; and it was declared, that if the plaintiff should be required to pay any of the partnership debts, he should be entitled to enter up judgment on the warrant of attorney. After the warrant of attorney was given, the defendant became bankrupt, and the plaintiff proved his private debt under the commission, and received a dividend thereon. After this, the plaintiff was sued separately on a joint and several bond given to the bankers of the firm, for a partnership debt, and a verdict was recovered against him. An arrangement was then entered into between him and the bankers, by which the latter allowed him to pay the bond by instalments, several of which he afterwards paid. It was sworn, that the defendant, who had not obtained his certificate, was now carrying on considerable business in *Chichester*. The question was, whether the execution taken out upon the warrant of attorney was valid, quoad the partnership debt, for which the plaintiff had been sued. Another objection was, as to the sufficiency of the stamp.

*Long* shewed cause, and contended, on the authority of *Mead* v. *Braham* (*a*), that the execution was good quoad the amount of the partnership debt, for which the plaintiff had been sued after the defendant's bankruptcy. The plaintiff clearly had a right to maintain an action against the defendant for this debt before the 49 *Geo.* 3. c. 121. s. 14., and there was nothing in that statute which deprived him of a legal remedy against the defendant. The debt for which execution was taken out, was very different from that proved under the defendant's commission. That was the private debt; this was the joint debt, for which the plaintiff was surety, and which he could not by possibility prove under the commis-

(*a*) 3 M. & S. 91.

sion, in consequence of the forbearance of the obligees of the bond. The defendant had paid no money under the bond since the bankruptcy, and it would be extremely hard if the plaintiff had no remedy against him, now that he was carrying on a prosperous business. Then, as to the objection to the stamp, it was true the stamp would not cover the whole amount of the debts scheduled in the warrant of attorney, but still it would cover so much as the plaintiffs sought to recover by the execution.

*Marryat*, in support of the rule, contended that this case was distinguishable from *Mead* v. *Braham*, because there the drawer of the bill of exchange, who had become liable for the amount, and afterwards sued the acceptor, had not proved the debt under the commission. In the present case, part of the debt secured by the warrant of attorney had been proved by the plaintiff, and he received a dividend upon it. As to the debt upon which the plaintiff had been sued, he must at least be considered as surety for the defendant, and therefore it was still competent to him by 49 *Geo.* 3. c. 121. s. 8, to prove it under the commission. The proof of the private debt must be considered as an election, and consequently, the plaintiff is deprived by s. 14. of the same statute, of any remedy at law. But, independently of this, the plaintiff's own conduct with respect to the partnership debt, concludes him. The plaintiff was surety for the debt due to the bankers, but in consequence of the arrangement entered into with them for the payment of the debt by instalments, he made it his own, and so altered the situation of the parties as to deprive himself of any remedy. Then as to the stamp, the whole sum secured by the warrant of attorney was more than 3000*l.*, the 7*l.* stamp was therefore insufficient, and, consequently, the instrument could not be enforced.

ABBOTT, C. J.—Upon the first point, I think there is no ground for setting aside the judgment and execution on

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the warrant of attorney. As to the partnership debt, I think the case is not within the 49 *Geo.* 3. c. 121. s. 8, inasmuch as no part of that debt was paid until after the bankruptcy; neither do I think the case comes within the 14th section, which prohibits a creditor from maintaining an action against the bankrupt after he has elected to prove his debt under the commission, because it is clear that the debt must be such as was capable of proof at the time the commission was sued out. Now here it does not appear that this debt was capable of being proved, for, in point of fact, it was not due at the time the commission was sued out. As to the point respecting the stamp, let the matter go before the master, to ascertain how much was actually due to the plaintiff at the time the warrant of attorney was given.

BAYLEY, J.—The question whether proof of a debt under the commission would destroy the right of a third person to proceed in an action against an uncertificated bankrupt, was decided in *Mead* v. *Braham*, where it was held that it would not.

HOLROYD and BEST, J.s concurred.

Rule discharged.

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FITZMAURICE *v.* WAUGH.

*Tuesday, June 17.*

Tutors dative appointed by a *Scotch* court, as guardians of an infant, executed for and on his behalf, and in his name, a tack or agreement for a lease, whereby a salmon fishery was demised for years to a tenant, at a certain rent, covenanted to be paid to the tutors dative, the infant, or to any other person or persons duly authorized to receive the same for behoof of the infant, his heirs or assigns:—Held, that the infant might maintain debt in his own name for arrears of rent, though he was not an executing party to the agreement, nor proved to be of full age at the time of action brought.

DEBT on a *Scotch* tack, or agreement for a lease, to recover the amount of one year's rent of a salmon fishery in *Scotland*, thereby demised to the defendant. The tack in this case was precisely in the same terms as that in *Carnegie* v. *Waugh*(a), except that there the rent was reserved payable "to the said *G. F. Carnegie* (the plaintiff), or to any person or persons duly authorized by him to receive the same, whereas here it was made payable "to the said *James Scott* and *James Mitchell Nicholson*, as tutors dative for the said *James Scott Fitzmaurice* (the plaintiff), or to any other person or persons duly authorized to receive the same for behoof of the said *J. S. Fitzmaurice*, his heirs or assigns." The defendant pleaded the general issue. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Michaelmas* Term, the plaintiff's case was confined to evidence of the execution of the tack by the parties, and of the arrear of rent; no proof was given that the plaintiff was a minor at the time when the action was brought. It was objected, on the part of the defendant, that the action could not be supported, on two grounds; first, that as there was no evidence that the plaintiff was of full age, it must be presumed that he was still a minor, and therefore incapable of suing; and, second, that as the agreement was made by his guardians during his minority, and the rent was reserved payable personally to them, he was no party to the contract, and had no interest in it, so as to entitle him to sue upon it. The learned Judge, however, was of opinion, that as the defendant had not shewn the plaintiff to be a minor at the time when the action was brought, it must be presumed that he was then of full age, and capable of suing; and that although he was not directly a party to the contract, still as it was made in his name,

(a) Ante, vol. ii. p. 277.

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and for his benefit, and as the rent was payable to his guardians also in his name, and for his behoof, he was so far a party to the contract, and possessed of a legal interest under it, as to qualify him to maintain an action upon it. The Jury were therefore directed to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

*Chitty*, in *Hilary* Term last, moved accordingly, and obtained a rule nisi on both points; and

*Marryat* and *H. I. Stephen* now shewed cause, and cited *Gilby* v. *Copley* (a), *Piggot* v. *Thompson* (b), *Bell* v. *Chaplin* (c), and *Bowen* v. *Morris* (d).

*Chitty* and *J. L. Adolphus*, contrà, relied upon *Evans* v. *Cramlington* (e), *Offley* v. *Warde* (f), and 2 *Inst.* 673.

THE COURT, in concurrence with the direction of the Lord Chief Justice at the trial, ruled, first, that it was incumbent on the defendant to shew that the plaintiff was a minor at the time of action brought; and, second, that the agreement having been made for the benefit of the plaintiff, and in his name, by the tutors dative, as his agents, it was competent to him to sue in his own name upon the contract, and therefore

Discharged the rule.

(a) 3 Lev. 138.
(b) 3 Bos. & Pul. 147.
(c) Hardr. 321.
(d) 2 Taunt. 374.
(e) 1 Vent. 211.
(f) 1 Lev. 235.

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The KING *v.* The MAYOR of LIVERPOOL, in the matter of PRICE.

*Tuesday, June* 17.

The 50 G. 3, c. 73, reciting 31 G. 2. c. 29. 3 G. 3. c. 6. and 13 G. 3. c. 62, makes certain amendments in the laws then in force respecting the trade of bakers, &c., and by s. 5. all powers given by the previous statutes upon the same subject are incorporated, except those altered by that statute. The 31 G. 2. c. 29. ss. 36 & 37, respectively take away the writ of certiorari, and give an appeal to the Sessions:— Held, that 50 G. 3. c. 73. s. 5. incorporates those sections, and that on a conviction under the latter statute, the certiorari is taken away and an appeal given.

*PATTESON* moved for a certiorari to remove a conviction under the Bread Act 50 *Geo.* 3. c. 73. into this Court. The object of the motion was to determine whether s. 5. of that statute virtually incorporated ss. 36 & 37 of 31 *Geo.* 2. c. 29, by the first of which, the certiorari was expressly taken away, and by the second, an appeal was given to the Sessions. He contended, that although s. 5. of 50 *Geo.* 3. c. 73, was a general clause of reference to 31 *Geo.* 2. c. 29. 3 *Geo.* 3. c. 6. and 13 *Geo.* 3. c. 62. yet it might be satisfied by incorporating the general, without including the special provisions of those statutes, one of which took away the certiorari, and the other gave an appeal. If this were so, then as the 50 *Geo.* 3. c. 73, did not take away the certiorari, it followed from the general rule of construction in cases of this nature, that the party convicted was entitled to the writ. He cited *Rex* v. *Sheppard* (*a*), *Rex* v. *The Justices of Surrey* (*b*), *Rex* v. *Dove* (*c*), and *Kaye*'s case (*d*).

*Hollingshed* shewed cause in the first instance, and contended, first, that the certiorari was by necessary interpretation taken away, by 50 *Geo.* 3. c. 73. s. 5.; and, second, that if not taken away, the defendant was entitled to appeal, under 31 *Geo.* 2. c. 29. s. 37, and therefore the motion for a certiorari came too early. He cited *Rex* v. *Sparrow* (*e*), and *Rex* v. *Eaton* (*f*).

(*a*) 3 B. & A. 414.
(*b*) 2 T. R. 510.
(*c*) 3 B. & A. 596.
(*d*) Ante, vol. i. 436.
(*e*) 2 T. R. 198.
(*f*) Id. 89.

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The Court took time to consider of the case, and judgment was now delivered by

Abbott, C. J.—This was a motion for a certiorari to remove a conviction under 50 *Geo.* 3. c. 73. It was contended that the writ of certiorari is in effect taken away by that statute, and that an appeal is given to the Sessions. We are all of opinion that the writ of certiorari is taken away, and that an appeal lies to the Sessions. The act in question is entitled "An act to alter, explain, and amend, the laws now in force respecting the trade of bakers, residing out of the city of *London*, or the liberties thereof, or beyond ten miles of the *Royal Exchange*." The title, therefore, shews that the object of the statute was to alter, explain, and amend the laws then in force. It begins by reciting the title of an act of 31 *Geo.* 2. c. 29; another of 3 *Geo.* 3. c. 6; and another of 13 *Geo.* 3. c. 62; and then it proceeds, "And whereas some of the regulations and provisions contained in the said several acts have been found defective, and in some respects injurious to the bakers and the public; and it is therefore expedient that the same should be altered and amended, and more effectual provisions made for ascertaining the due weight of bread, and for the better observance of the Lord's day commonly called *Sunday*." The former acts, therefore, are not in terms repealed, except so far as they are hereby altered. The first section imposes a penalty on bakers for selling bread short of weight; the second requires that bakers shall keep weights and scales; the third contains a provision against baking on *Sunday*; the fourth contains an exception in favor of the rights and liberties of the universities; and then comes the fifth section, upon which arises the question whether this or any of the other acts is to be construed so as to take away the certiorari. The language of it is this:—"That all powers, authorities, provisions, directions, penalties, forfeitures, clauses, matters and things, contained in the several acts now in force, not altered or varied by any of the provisions

of this act, as far as the same can be made applicable, and can be applied for the carrying into execution the purposes of this act, shall be used, exercised, and put in execution, for enforcing the regulations, provisions, and directions of this act, in such and the same manner, as if the same were herein contained, and were at large re-enacted and made part of this act; and the penalties by this act inflicted shall be recovered and applied in like manner as the penalties by the said several other acts inflicted, are directed to be recovered and applied." The question therefore turns upon the effect of this fifth section, founded as it is on other acts, which it notices as bearing on the same subject. Now a general, and, I must say, an important question is raised upon this motion. It is perfectly clear, that according to the general rules and principles of law, a certiorari issues from this Court, unless some act of parliament has taken it away in express terms. So on the other hand an appeal to the Sessions against a conviction of Magistrates, does not lie unless the act of parliament gives it. These two general principles are now clearly established. The question therefore turns entirely upon the construction of this section. The clause itself is not altogether free from ambiguity. Construing the statute as a repeal of the recited acts of parliament as to those purposes for which it was passed, we see that it makes alterations in some clauses of the previous acts, and amends others, but it does not make any alteration as to what had been previously established by 31 *Geo.* 2. c. 29. ss. 36 & 37, which give the appeal, and take away the certiorari. We are therefore of opinion, and feel ourselves called upon to say upon the whole, that although some obscurity exists in this particular section by the introduction of too many words, yet that it was the intention of the legislature to leave the provisions of the former acts, as they regard the appeal and certiorari, in full force; and consequently that the appeal still lies, and the certiorari is taken away. We are of opinion therefore that the party applying must take nothing by his motion.

Rule refused.

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*Tuesday, June 17.*

## MURRAY, Administrator of WILLIAM MURRAY, deceased, *v.* Earl STAIR.

Where a bond, executed with the usual formalities, was delivered (by mutual agreement between the obligor and obligee) into the hands of the subscribing witness, there to remain "until the death of *A.*" who was named in the condition, "and until certain securities were returned to the obligor:"—Held, that it was for the Jury to determine whether the bond was delivered as an escrow or as a deed.

A bond executed with the usual formalities, may operate as a deed in præsenti, though at the time of execution it is expressly agreed, that it shall not take effect until a certain event has happened.

Where the obligor of a post obit bond craves oyer thereof, and sets out the condition, it is not necessary for the obligee to aver the death of the person at whose decease the money is to become payable.

A bond conditioned for the payment of 2000*l.* by *A.* to *B.* *six calendar months next after the death* of *C.*, is not within 8 & 9 *W.* 3. c. 11. s. 8. requiring the suggestion of breaches.

It seems that such a bond is within 4 & 5 *Ann.* c. 16.

DEBT on a bond in the common form, dated 3d *November*, 1813. The defendant craved oyer and set out the bond, by which the defendant, in the name of *J. W. H. Dalrymple*, esq. became bound to *William Murray*, the intestate, in the penal sum of 4000*l.*, to be paid to the intestate or his attorney, executors, &c., the condition of which was, "that if the above bounden *J. W. H. Dalrymple*, his heirs, &c. shall and do, within six calendar months next after the decease of his kinsman *John Dalrymple*, Earl, Viscount, and Baron of *Stair*, and Baron *Dalrymple*, of *Newliston* and *Stranrawer*, of the kingdom of *Scotland*, well and truly pay, or cause to be paid unto the said *William Murray*, his executors, &c. the sum of 2000*l.* of lawful money of *Great Britain*, together with interest for the same, without any deduction or abatement whatsoever, then the said obligation shall be void and of no effect, otherwise it shall remain in full force and virtue. The defendant then pleaded, that on the day of the date of the bond, he had delivered the same to one *William Saunders*, the subscribing witness thereto, merely as an escrow, on condition that it should remain in the hands of the latter until the decease of Lord *Stair*, and that then and then only it should be delivered to *W. Murray*; that the bond accordingly remained in *Saunders*'s possession until the 10th *March*, 1819, (before the death of Lord *Stair*,) when he wrongfully parted with it, and thereby it wrongfully came into the hands of *W. Murray*, and so the defendant saith it is not his deed in manner and form as the plaintiff hath alleged. Secondly, the de-

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fendant pleaded that the bond was delivered as an escrow, on condition that it should be delivered to *W. Murray*, in case two promissory notes for 1000*l.* each, then outstanding, should be delivered up to *Saunders* to be cancelled; and averring that the notes had not been delivered up to *Saunders* for that purpose. On these pleas issue was joined. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after last *Trinity* Term, it appeared in evidence, that at the time the bond was executed, the plaintiff's intestate held two of the defendant's promissory notes for 1000*l.* each, which he threatened to enforce. To prevent this, the defendant proposed to execute the bond in question, but expressed a wish that it should not go into the money market until after the death of Lord *Stair*, lest the latter should come to the knowledge of the fact of his having executed such a bond, which might operate to his prejudice. The intestate accordingly agreed to take the bond on these terms. Mr. *Saunders*, the subscribing witness, was the defendant's attorney, and having prepared the bond, it was executed in the usual manner. At the time of the execution, it was agreed between the intestate and the defendant, that the bond should remain in Mr. *Saunders*'s hands until the death of Lord *Stair*, and that it should not be delivered to the intestate until he returned the defendant's promissory notes. This last was an express stipulation on the part of the defendant, and he declared that he would not have executed the bond on any other condition. It further appeared, that in the year 1812, Mr. *Saunders* had been surety for Mrs. *Murray* the intestate's wife, on the occasion of her taking out letters of administration to an estate in which she was interested; and being anxious for some indemnity, he kept the bond in question, partly for the purpose of protecting himself against personal consequences in that transaction. A few weeks after the bond had been executed, the intestate informed Mr. *Saunders* that Mrs. *Murray* had misappropriated some money belonging to the estate to which she had administered, but reminded him that he was safe against any con-

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sequences which might follow, because he had Lord *Stair's* bond in his possession. In *June*, 1821, defendant's kinsman died, when the defendant succeeded to the title of Lord *Stair*. At the intestate's request, however, Mr. *Saunders* had in the early part of 1819, delivered over to him the bond for the purpose of depositing it with his woollen draper, as a security for a debt which he owed for goods supplied to him in his business of a tailor. It was not disputed that the bond was executed by the defendant on the express condition that it was to remain in Mr. *Saunders's* hands until the death of the defendant's kinsman, and until the notes were returned. The notes were not in fact returned before action brought. It was contended on this evidence, that the action could not be maintained, because it was the manifest intention of all the parties, that the bond was not to take effect until the death of Lord *Stair*, and therefore having been delivered merely as an escrow, and not as a deed, it was not available in the hands of the plaintiff. In support of the objection, *Johnson* v. *Baker* (a) was referred to. The learned Judge said he would save the point, and the plaintiff had a verdict with liberty to the defendant to move for a nonsuit.

In *Michaelmas* Term, a rule nisi to enter a nonsuit was obtained accordingly; and in *Easter* Term the question was argued by *Copley*, S. G. *Gurney*, and *Comyn*, for the plaintiff, and *Scarlett*, *Marryat*, and *E. Lawes*, for the defendant. *Sheppard's Touchstone*, 58; *Vin. Abr.* tit. *Fait*, M.; and *Co. Lit.* 36, were cited.

THE COURT on that occasion were of opinion that the case ought to go to a second trial, in order that it might be presented to the Jury as a question of fact upon the whole evidence, whether the bond was delivered to *Saunders* upon the express condition that it was not to operate as a deed

(a) 4 B. & A. 440.

until the death of the then Earl *Stair*, and then only on the express condition, that the promissory notes were to be returned to the defendant.

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At the Sittings after last *Easter* Term, the case was again tried before *Abbott*, C. J., and nearly the same evidence having been given, the Jury, under his Lordship's directions, were of opinion that the bond was delivered by the defendant, not as an escrow, but as a present binding obligation, and intended to be binding from the moment of delivery, and therefore they found for the plaintiff.

*E. Lawes* on a former day in this Term moved for a rule nisi to arrest the judgment, on the ground, first, that no breach of the bond had been assigned on the record by way of suggestion or otherwise, in compliance with the statute 8 & 9 *W.* 3. c. 11. s. 8. He insisted that this was not to be considered as a mere post obit bond, and therefore not within 4 *Ann.* c. 76. The principle to be collected from the cases decided upon these statutes, was, that where the money does not appear to be payable upon the face of the condition at a time certain, a breach must be assigned. Secondly, there was no allegation as to the time when the late Earl *Stair* died, which he contended was necessary.

THE COURT granted a rule nisi on the first point; but as to the second, said that an averment as to the death of the late Lord *Stair* was unnecessary, because if that event had not happened, it was competent to the defendant to plead it as matter of defence; and having omitted to do so, the plaintiff was not bound to prove the fact (*a*).

*Comyn*, now shewed cause, and contended, that this being a post obit bond, it was provided for by 4 *Ann.* c. 16, and consequently no breach need be suggested under the statute

(*a*) See *Meredith* v. *Allcyn*, 1 Salk. 138, and *Lockey* v. *Darby*, 1 Ld. Raym. 103.

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8 & 9 *W*. 3. c. 11. s. 8. (*a*). It has been long settled, that the statute of *William* does not extend to post obit bonds. Mr. *Tidd* in his Practice enumerates the cases which have been held within the statute, as a bond conditioned for the payment of an annuity, or of money by instalments; or a bond conditioned to perform an award, &c. but he expressly observes that the provisions of this statute do not extend to post obit bonds, or other bonds conditioned for the payment of *money*, which are provided for by the statute of *Ann.*; nor to bail bonds given to the Lord Chancellor by the petitioning creditor for a commission of bankrupt under 5 *Geo.* 2. c. 30. s. 23, &c. (*b*). This is clearly a post obit bond, being payable six months after the death of the late Earl *Stair*, and falls within the rule of practice so established. The case of *Wardell* v. *Fermor* (*c*) was an action on a post obit bond, and the reporter observes in a note, "There was a suggestion in this case under 8 & 9 *W*. 3. c. 11. but it was considered quite superfluous." But *Cardozo* v. *Hardy* (*d*) is an authority expressly in point. That was an action against executors on a money bond given by their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after the death of the testator, whichever should first happen, and it was held unnecessary to suggest breaches under this statute. In the present case it was quite unnecessary to suggest any breach, first because the sum specified in the bond is certain, and second, because the time at which it is payable is matter of mere computation.

*Scarlett*, *Marryat*, and *E. Lawes*, contrà. This case is not within the statute of *Ann.*, and the only question is, whether it does not come more properly under the provisions of the statute of *William*, and thereby require the suggestion

(*a*) By which it is enacted, "that in all actions upon bonds, or on any penal sum for non-performance of any covenants or agreements in any deed or writing, the plaintiff may assign as many breaches as he shall think fit."

(*b*) Tidd, 604.

(*c*) 2 Campb. N. P. C. 285.

(*d*) 2 J. B. Moore, 220.

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of a breach. It is true that the latter statute has been held not to apply to post obit bonds, but that is upon the principle that a post obit bond is payable on a day certain. Here, however, the bond does not appear to be payable on a day certain, and therefore it was necessary to suggest a breach, by alleging that the contingency on which it was to become payable had happened, and the time when it happened, so as to make the time of payment certain. The case of *Cardozo* v. *Hardy* is distinguishable from this, because in that there was an alternative which rendered the time of payment certain. The condition was payment of the money at a future day, or within one month after the obligor's decease. So that in that case the day of payment could not extend beyond the period limited in the condition, and therefore the bond was within the principle, and the very words of the statute of *Ann.*, which gives the Court an equitable jurisdiction. In this case the bond was not payable at a day certain, and consequently the suggestion of a breach was necessary. The language of *William* 3 is compulsory, and if this be a bond within that statute, it is quite clear that a breach should have been suggested. They cited *Drage* v. *Brand* (*a*), 5 *Rep.* 17. b, *Baldee* v. *Elers* (*b*), *Welch* v. *Ireland* (*c*), *Ex parte Winchester*, mentioned in *Ex parte Groome* (*d*), *Willie* v. *Walker* (*e*), *Middleton* v. *Bryan* (*f*), *Smith* v. *Broomhead* (*g*), *Kellier* v. *Franklin* (*h*), *Walcot* v. *Goulding* (*i*), and *Willoughby* v. *Swinton* (*k*).

ABBOTT, C. J.—The words of 8 & 9 *W.* 3. c. 11. s. 8. are certainly very comprehensive, and are somewhat obscure, but I am of opinion that this bond is not within their operation. Two classes of cases have been decided on this statute, one by which it is now established, that annuity bonds, or bonds conditioned for the payment of money by instalments, are, and the other that bonds conditioned for

(*a*) 2 Wils. 377.
(*b*) 5 T. R. 250.
(*c*) 6 East, 612.
(*d*) 1 Atk. 113.
(*e*) 2 Dougl. 521.
(*f*) 3 M. & S. 155.
(*g*) 7 T. R. 300.
(*h*) 1 Stark. N. P. C. 291.
(*i*) 8 T. R. 126.
(*k*) 6 East, 550.

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the payment of a certain sum on a certain day, are not, within the statute. The first are undoubtedly within it, because the statute directs, that the judgment shall stand as a security for future breaches, which, before the statute passed, I apprehend, even a court of equity could not have directed. The reason why a bond conditioned for the payment of money by a certain day, has been held not within the statute, is, that there is nothing for the obligee to do but to sit down and compute how much he ought to receive. In such cases the intervention of a Jury is not requisite to compute principal and interest, nor is there any necessity for resorting to a Court of Equity. This bond, is conditioned for the payment of a single sum certain, and the judgment upon it will have the effect only of giving the party his right to execution for that sum, and until it is paid the judgment will remain in full force. But it is said that this is distinguishable from the case of a bond conditioned for the payment of money on a day mentioned in the condition, because here the day of payment is not mentioned, and therefore the day is uncertain. The only uncertainty is, as to the day when the death of the party on whose decease it is to take effect, shall take place; but when that is once ascertained, all difficulty is removed. The matter is easily deducible to certainty by computation. So that this is simply the case of a post obit bond conditioned for the payment of the money therein mentioned. But it is argued that this bond is not within 4 *Ann.* c. 16. We are not called upon to decide that question; but I cannot forbear observing, that I see no reason for saying that the condition of a bond of this description is not within the statute. The authority against it is the dictum of Lord *Hardwicke* in *Ex parte Winchester* (*a*), but I think the observations of Lord *Mansfield*, in *Wylie* v. *Wilkes* (*b*), upon that dictum, are very important. The dictum alluded to, is, that the words "*at a day or place certain*" are *material* words in the statute, and that bonds not given for the payment of a lesser sum at a day or place certain, are not

(*a*) 1 Atk. 116. (*b*) 2 Doug. 521.

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within it; but Lord *Mansfield* observes, "I hardly think Lord *Hardwicke* would have considered those words as sufficient to take a case out of the statute, which is clearly within the reason and meaning of it, if it had not been to give the party the advantage of the equitable subtlety, by which he was entitled to prove under the commission," but Lord *Mansfield* does not express his own approbation of that doctrine. If we read the words of 4 *Ann.* c. 16. I cannot help thinking, that this case comes within their operation. The statute provides for two things; first, that payment before action brought shall be good in a certain event, which at common law it would not be, whether it was or was not a bond within the 8 & 9 *W.* 3.; and second, that if the party has slipped the day of payment he may be relieved by paying the money into Court, and may plead such payment in bar of the action. Section 12, says, "that where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same, upon payment of a lesser sum at a day or place certain, if the obligor have before the action brought paid to the obligee the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeazance, and had been so pleaded." The next section declares, "that if at any time, pending an action upon any such bond, with a penalty, the defendant shall bring into the Court where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in, shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly." What is meant by payment "of a lesser sum

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at a day certain"? It means payment on a day certain. May not that be satisfied by saying that the day is certain, if it can be made so by means of something that is to happen? It clearly may be made certain or become certain by something which shall happen after the execution of the bond, though it does not appear on the face of it. Suppose in the present instance the principal and interest had been tendered to the obligee at the end of *seven* months, before action brought, and then he had pleaded the tender, I think that if the question had been presented to the minds of the Court in that state of pleading, they would have hesitated long indeed before they said that the bond was not within the statute, and that the party should be obliged to go on with his action, and compel the defendant to pay all the costs, because he had not paid the money on the very day it was due, though there was no dispute about the sum. It seems to me therefore that this bond is not within the statute of *William*, and consequently this rule must be discharged, though there be no suggestion of a breach.

BAYLEY, J. was of the same opinion, and said that *Cardozo* v. *Hardy* (*a*) was an authority in point. It was unnecessary to suggest any breach in this case, because the day of payment was capable of being made certain by mere computation, and therefore the case was not within *William* 3.

HOLROYD, J. concurred.

BEST, J. thought the practice was completely settled by the cases cited in Mr. *Tidd's* excellent book; and *Cardozo* v. *Hardy* was an express authority for deciding that no breach need have been suggested in this case.

Rule discharged.

(*a*) 2 J. B. Moore, 220.

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## HARDING *v.* WILSON.

*Tuesday, June 17.*

Lease of a parcel of building ground described the premises as abutting on "an intended way of thirty feet wide," which was not then set out. Lessee underlets the premises, and describes them as abutting on "an intended way," without mentioning the width. The soil of the intended way, together with the adjacent land on the other side, is afterwards sold by the owner to another person, who narrows the intended way to the extent of three feet, by building a wall thereon:—Held, that the tenant of a house built by the under-lessee was entitled only to a way of necessity and convenience, and such being left him, he could not maintain case for the alleged encroachment.

THIS was an action on the case for a nuisance. The declaration stated, that the plaintiff was possessed of a messuage or dwelling-house, and that by reason of his possession thereof, he was entitled to a right of way thereto, from a common highway, to pass and repass on foot and on horseback, and with cattle, carts, and carriages; and that the defendant obstructed such way by erecting a wall thereon. Plea, not guilty.

At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last *Michaelmas* Term, it appeared in evidence, that on the 10th *August*, 1809, a lease of a parcel of ground was granted by Mr. *Sloane* to Mr. *W. Bolton* for a term of years. In that lease one of the abuttals was described as "an intended way of thirty feet wide," separating the land thereby demised from other land which had been let to *Bolton* by a prior lease. In 1811, Mr. *Bolton* underlet to a Mr. *Pittard* a portion of the ground so demised, "together with all ways thereunto appertaining;" and it was described as abutting "on an intended way," without any width being mentioned. Upon this piece of land Mr. *Pittard* built a house and let the same to the plaintiff. In the year 1820, the defendant purchased the land on the opposite side of the intended way, mentioned in the lease of *August*, 1809, and also the soil of that way. Upon this way he built a wall, leaving a road in front of the plaintiff's house of only twenty-seven feet in width. The plaintiff's cause of action was in thus abridging the width of the way in front of his dwelling. It appeared that when the leases above mentioned were executed, the road in question had not been in fact set out, but before the alleged injury was committed, there had been a road of thirty feet in width for a period of about four years. No material damage appeared to have been sustained by the plaintiff by the erection of the wall in question, the road left him being sufficiently

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wide for carriages to pass and repass. The learned Judge told the Jury, that as it did not appear that the plaintiff had had the grant of a way of any particular width, it was for them to determine whether the wall in question was a nuisance. The Jury found their verdict for the plaintiff, one shilling damages.

In *Hilary* Term *Scarlett* obtained a rule nisi for a new trial.

*Gurney* and *Andrews* now shewed cause, and contended, that the verdict ought not to be disturbed. It was clear from the lease of 10th *August*, 1809, that Mr. *Bolton* was entitled to a way of thirty feet in width, because that lease described the way as an intended way of thirty feet wide. It was true that in the lease of 1811, the intended way therein mentioned, had no description as to width assigned to it, but as that lease spoke of the intended way, it must necessarily be understood to mean a way of the same width. If the first lessee was entitled to a way of thirty feet wide, it was obvious that his under-tenant must have the same rights, although the under lease did not give the dimensions of the intended way. This case was moved as a verdict against evidence, and supposing the plaintiff not to be strictly entitled to a way of thirty feet wide, still it was a question for the Jury to determine whether the wall erected by the defendant was a nuisance. It was for them to say upon the evidence, whether the road was as commodious after the wall was built as before. The fact that there was room for a carriage to turn round, on the road, could make no difference. The question for the Jury was, whether this was in fact a nuisance, and as they had found in the affirmative, the verdict ought not to be disturbed.

*Scarlett* and *Littledale* in support of the rule insisted, that as the lease granted to the plaintiff's landlord did not demise a way of any particular width, there was nothing to

support the plaintiff's claim to a way thirty feet wide. In that lease the land was described as being bounded on one side by "an intended way," without saying of what width it was to be. In this case there was clearly no privity between the plaintiff and his landlord's lessor, so as to entitle him to the privileges granted by the lease of *August*, 1809, by *Sloane* to Mr. *Bolton*. Supposing, however, there were such privity, still the description in the lease of 1811, did not amount to a grant of a way thirty feet in width. The under lease could not by any force of construction be considered as incorporating the description of the road in the original lease. The lease from *Sloane* to *Bolton* might indeed be obligatory on the latter to make a way thirty feet wide, but until the way was actually set out, *Bolton's* under-tenant could only have a right to a convenient way, or a way of necessity. The plaintiff's claim could only be founded in express grant; for supposing this way to have been originally thirty feet wide, still there was nothing to shew that the plaintiff was entitled to a way of that width, and there was nothing from which the Jury could presume a way to the extent claimed. Undoubtedly the plaintiff was entitled to a convenient way; the declaration claimed no more, and the evidence clearly proved that he still had a convenient way though the wall had been erected. Admitting *Bolton* the original lessee to have been entitled to a way thirty feet in width, what was there to prevent his abridging that right in any under-lease which he might grant? If nothing; then the construction now contended for was consentaneous with the very terms of the under-lease granted, because there it was merely described as "an intended way," without any specification of width. The argument on the other side, if it had any force, must go this length, that all under-tenants are entitled to every privilege or advantage contained in their immediate landlord's original lease. That was a proposition, however, which could not be supported.

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ABBOTT, C. J.—I think the defendant is entitled to a new trial. It appeared in evidence at the trial, that the road now actually left after building the wall complained of as a nuisance, was as wide as the plaintiff's convenience required, and that the plaintiff himself had declared that he found no inconvenience from the erection of this wall, and was satisfied with the road in its present state. His landlord, Mr. *Pittard*, has a right probably to sue in his name, but when the evidence shews that no inconvenience has been sustained by the plaintiff himself, the latter cannot recover unless he can shew a right to a road of a particular width, and an actual infringement of that right. The question is, whether the *right* is made out in evidence on the part of the plaintiff. If we go back to the lease from Mr. *Sloane*, who was the proprietor of the whole of the land over which the intended way was to be carried, we find that he does not grant to Mr. *Bolton* a way of thirty feet wide. All he does is to describe the ground demised as abutting on a way *intended* to be made, and *intended* to be of the width of thirty feet. That is not a grant of a way of that width; it is merely the expression or declaration of an intention on the part of Mr. *Sloane*, that there shall be a way of that width. If, indeed, that would operate as a grant of a way of that width, the right might be made out, and the plaintiff entitled to a verdict; but if that deed did not operate as a grant, but merely as a declaration or expression of an intention, then a departure from the intention so declared, would not give a right of action, unless the party sustained some injury in consequence. Here it is found, that no injury has been sustained, and there being no foundation in right established, I think there ought to be a new trial.

BAYLEY, J.—This case turns upon the construction to be put on the original lease from Mr. *Sloane* to Mr. *Bolton* With a view to the enjoyment of the land in question, it was absolutely necessary that Mr. *Bolton* should have some right

of way over the lands of Mr. *Sloane*, and Mr. *Bolton*, if he thought fit, might make it matter of specific bargain, that there should be a road of a specific description, and if he had bargained for a road thirty feet wide, most probably the lease would have contained some covenant for that purpose. Without any express stipulation as to the species of road, the law would give Mr. *Bolton* a way over Mr. *Sloane's* land for the convenient use of the houses which were to be built on the land demised. In this case there is no express stipulation as to what the way should be. The land in question is described as having one of its abuttals upon a piece of land thirty feet wide, intended to be a highway. That is only the declaration of an intention on the part of the owner of the soil, who does not in express terms, nor of absolute necessity, stipulate, that that shall be the width of the road. There are no words used to fetter his intention, and bind him to the fulfilment of it. In that respect I think it was not competent to Mr. *Bolton*, or any person claiming under him, to say, he should not be at liberty to deviate from that intention, provided in that deviation, he still left Mr. *Bolton*, and those who claim under him, such a way as should be necessary for the convenient use and occupation of the houses to be built on the land demised. For these reasons it appears to me that the verdict in this case ought not to have been found for the plaintiff, and therefore, there must be a new trial.

HOLROYD, J.—The plaintiff's claim, as stated in this declaration, is, that he was possessed of a messuage or dwelling house, and that by reason of his possession thereof, he was entitled to a right of way to pass and repass on foot and on horseback, and with cattle, carts, and carriages. The declaration does not specify the particular description of road to which the plaintiff claims title, nor does it allege that he was entitled to a way thirty feet wide. I admit, however, that the declaration would be sufficient to cover such a way, provided the evidence was sufficient to sustain a title

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to a road of that width. The ground on which the plaintiff's house is built, and the ground also over which the way claimed went, previous to 10th *August*, 1809, belonged originally to Mr. *Sloane*. By the lease of that date, Mr. *Sloane* demised part of his land to *Bolton*, which he describes to be abutting on "an intended way of thirty feet wide." When he demised that part of the land, the lessee would have no right of way except such as was incident to, or could be claimed under the lease. The same principle would hold as to persons claiming under that lease. The plaintiff claims under that lease in consequence of the under-lease granted to his landlord, but still he would be in no better situation than the original lessee. He would undoubtedly be entitled to a way of necessity and reasonable convenience. Looking at the case in that point of view, it appears from the evidence, that the plaintiff has still left to him a reasonable way, and a way of necessity. But he says, that in consequence of the description of the premises contained in the lease of 10th *August*, 1809, a right of way thirty feet wide is granted to him, either expressly or by implication. The lease does not contain an express grant of such a way, it only speaks of "an intended way thirty feet wide." But that is no part of what is granted by the lease, which is sufficiently manifest by its being stated as abutting on the premises demised. It is not even meant to be a grant of the way by implication, because it is only the expression of an intention. The utmost it amounts to is, a description of an intended way for the use of the houses afterwards to be built. The declaration of an intention cannot be construed as an implied grant. Then does the under-lease carry the case any farther? I apprehend not. That lease describes the premises in question with abuttals, "together with all ways thereunto appertaining." Now under these words the right of way in question would not pass, it being over the soil of the original lessor. I agree they would give a way ex necessitate as far

as the convenient enjoyment of the premises demised are concerned, but no farther. Where leases of this kind are granted, they generally contain the words "together with all ways, now, or heretofore, at any time, and in any way used;" and under such words it is clear, that a way of necessity over the lessor's own soil would pass, although it did not exist antecedently. But in the absence of those words, the lessee would have no other right of way, but what he had ratione tenuræ. I think, however, that the former lease, even supposing it could be engrafted on the under-lease, would not amount to a grant of a right of way of thirty feet wide, and that by the under-lease no right of way passed except a reasonable and convenient way to the demised premises. That right of way appears not to have been infringed, and therefore I think there ought to be a new trial.

BEST, J.—I am of the same opinion.

Rule absolute, on payment of costs.

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## BISHOP *v.* HOWARD.

*Tuesday, June* 17.

Where a lease for years expired at *Midsummer*, and the tenant refused to give up possession of the premises, insisting that he was entitled to notice to quit, and afterwards continued in possession until *Christmas*, and paid rent to *Christmas*, when he tendered the keys of the premises to his landlord, which the latter refused to take:—Held, that this was not a holding over, but conclusive evidence in presumption of law of a tenancy from year to year, which would entitle the landlord to maintain use and occupation for a quarter's rent due at *Lady-day*.

THIS was an action to recover one quarter's rent for the use and occupation of a public-house. Plea non assumpsit. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Michaelmas* Term, the case was this:—The premises in question consisted of a public-house, which had been demised by the plaintiff to the defendant, for a term of years, ending at *Midsummer*, 1821.

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Shortly before the expiration of the lease, the plaintiff applied to the defendant to give up possession. The defendant being desirous of continuing in the house until the next licensing day, when he expected to have his license renewed, and then remove it to another house, refused to give up possession until the following *Christmas*, when he tendered the keys of the house to the plaintiff, who refused to take them. There was no distinct evidence of the payment of rent at *Michaelmas*, but it appeared that the defendant paid a quarter's rent in *March*, 1822, for which the plaintiff gave him a receipt as and for a quarter's rent due at the previous *Christmas*. The present action was brought for a quarter's rent, claimed to be due from *Christmas*, 1821, to *Lady-day*, 1822. It was contended at the trial, that as there was no evidence of an agreement for a new tenancy, from *Midsummer*, 1821, the action could not be maintained, and it was insisted, that the payment of rent since, could not make any difference. The learned Judge left it to the Jury, as a question of fact, whether a new agreement for a tenancy from year to year, could be inferred from the act of paying rent which had become due after the expiration of the lease at *Midsummer*, 1821, or whether the retaining possession of the premises was a mere holding over; for in the latter case the defendant would be entitled to a verdict. The Jury found for the defendant.

*F. Pollock*, in *Hilary* Term, obtained a rule nisi for a new trial.

*Scarlett* and *R. Scarlett*, now shewed cause, and contended, that as there was no evidence of an express contract for a tenancy from year to year, or of any other tenancy, after the expiration of the lease, this action could not be maintained. The Jury, by their verdict, negatived any such contract, and there was nothing in the case from which it could be presumed. When the lease expired, the defendant could, at the utmost, be considered but as tenant

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at will. To support this action, there must be distinct evidence of a continuing tenancy from year to year. It was clear that no contract for such a tenancy existed before *Midsummer*, 1821, and there was nothing to infer it afterwards. In the case of *Wright* v. *Darby* (a), the question turned on the reasonable supposition, that a contract for a continuing tenancy existed. In the present case, the defendant's character of tenant, ceased at the end of the Term, and no notice to quit at *Midsummer* need be given, because his lease expired at *Midsummer* day. For this *Messenger* v. *Armstrong* (b), was an authority. After the expiration of the lease, the defendant merely held over, and he had a right to quit at *Christmas*, when the keys were tendered. The defendant's refusal to give up at *Midsummer*, was perfectly reconcileable with the fact, that no new agreement had been entered into, because there had been some doubt between the parties whether the old tenancy would or would not end at *Midsummer*. The case of *Zouch* v. *Willingall* (c), was distinguishable from this, because there the defendant had been previously tenant from year to year. In this case there was nothing from which an agreement for a new tenancy could be presumed, and therefore the decision of the Jury was correct.

*F. Pollock* in support of the rule. The question in this case was for the decision of the Judge, and not for the Jury. The evidence adduced, clearly established in presumption of law, a tenancy from year to year, or at least a quarterly tenancy, and therefore the plaintiff was entitled to a verdict. Before *Midsummer*, the plaintiff says, "will you give me possession at the period when your tenancy expires?" The defendant says "no, I am entitled to notice to quit," and he continues in possession. In what character then does he hold? Clearly in the character of tenant from year to year. The very refusal of the defendant

(a) 1 T. R. 159. (b) Id. 53. (c) 1 H. Bl. 311.

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to give up possession, shews that he considered himself as tenant, and entitled to notice to quit. What was formerly considered a tenancy at will, is now held to be a tenancy from year to year. *Doe* v. *Darby*, *Doe* v. *Watts* (a), and *Doe* v. *Weller* (b), are authorities to shew that this was a tenancy from year to year, and not a mere holding over. Pending an agreement for a lease, the occupation is a tenancy from year to year. It is not necessary that there should be a renting for a full year after the expiration of the previous lease, in order to constitute the defendant a tenant from year to year. Here the defendant is called upon to go out at the expiration of the lease; he says "I will not go out, I am your tenant, I am entitled to notice to quit," and after that he pays rent up to *Christmas*, no notice to quit having been given. Suppose the plaintiff had brought ejectment, without notice to quit, would not the production of the receipt for rent paid up to *Christmas*, have been a complete answer to the action? Most undoubtedly. The defendant has no right to say, under such circumstances, that he was merely holding over, and not a tenant. The refusal to quit at *Midsummer*, and the payment of rent to *Christmas*, render this case too plain for argument.

ABBOTT, C. J.—It occurred to me at the trial, that the refusal to quit at *Midsummer*, and the payment of rent at *Michaelmas* and *Christmas*, were acts from which a new contract for hiring the premises from year to year, might or might not be presumed, and that it was the proper province of the Jury to draw the inference one way or the other. I considered it a question for the Jury, and not a question of law. Under that impression I left it to them to say, whether the relation of tenant from year to year was contracted between the parties, or whether the defendant merely held over; for in the latter case, I told them he would not be liable, and they found their

(a) 7 T. R. 83. (b) Id. 478.

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verdict for the defendant. Now, if those acts I have mentioned, were conclusive evidence of a new tenancy from year to year, I should have left no question to the Jury, but should have told them that they ought to find for the plaintiff, the defendant being concluded in law by his own acts. My learned Brothers are strongly of opinion that that was so, and that I ought to have told the Jury that the defendant was concluded, the law having settled and ascertained, that the commencement of another year was evidenced by payment of rent for a part of that year. They are of opinion that the payment of a quarter's rent at *Christmas*, was a fact from which the law would necessarily imply a contract between the parties for the whole year. I own I have some little doubt about it, but my learned Brothers being of opinion that there should be a new trial, I defer to their authority.

BAYLEY, J.—I am of opinion, that there was no case to go to the Jury as to the terms of the defendant's holding. The defendant was certainly in the occupation of the premises after *Midsummer*. There was some question between him and his landlord as to the terms of quitting. He insists upon a notice to quit, and he says he is entitled to hold over, and prevent any other tenant from coming in. He continues to occupy the premises from that period until the *Christmas* following, and in *March*, 1822, he pays a quarter's rent up to the *Christmas* preceding. That seems to me to be evidence that he had previously paid a quarter's rent up to the *Michaelmas* preceding. Now, if he had been paying rent at *Michaelmas*, and afterwards at *Christmas*, it appears to me, that the payment of that money as *rent*, took away from him the power of saying, that the relation of landlord and tenant did not exist. So, in like manner the landlord would have no right to deny such a relationship. The true way of trying the question is this; suppose, after the payment of the *Michaelmas* rent, the present plaintiff, instead of bringing use and occupation,

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and treating the defendant as tenant, had brought an ejectment to turn him out, it seems to me, that the production of the receipt for payment of rent, or proof of payment of rent up to the preceding *Michaelmas*, would be conclusive evidence, that the relation of landlord and tenant was subsisting between the parties, and would have been a bar to the ejectment. The plaintiff's situation would be singularly hard if he was precluded from maintaining, either an action for use and occupation, or an ejectment, for if he could not maintain use and occupation, he could not maintain ejectment.

HOLROYD, J.—I think this action is maintainable. The mere holding over, certainly does not constitute a fresh tenancy from year to year. The party may be treated as a trespasser, or if the trespass be waived, an action would lie for use and occupation by reason of holding over. It appears here, that the defendant insisted that he was entitled to notice to quit, and therefore kept possession of the premises. I think it must be taken, that the rent due at *Michaelmas* had been paid, because he afterwards paid the quarter due at *Christmas*. It is most obvious that the money so paid, was paid as rent in the character of tenant. If he insists that he has a right to notice to quit, and afterwards pays quarterly rent, and the landlord submits to receive it, I think that of itself must be taken as evidence of a fresh tenancy. The landlord treats him as tenant upon his insisting upon his right to a notice to quit, and allows him to continue tenant. This must be considered as evidence of a tenancy from year to year, without any other proof.

BEST, J.—I am of the same opinion. Mr. *Pollock* has put this case upon the true ground, namely, on the principle of mutuality. If the plaintiff could not turn the defendant out of possession by ejectment after the defendant had attorned to him by the payment of rent at *Michaelma*

and *Christmas,* so the defendant could not disclaim the character of tenant, and say that his landlord had no right to treat him as a tenant from year to year. The payment of rent on the one hand, and the acceptance of it on the other, is totally inconsistent with the idea of holding over as a wrong doer. Suppose the plaintiff had brought trespass for holding over, or ejectment to recover possession of the house, the moment the defendant put in his receipt for rent, it would be at once an answer to either of those actions. I am clearly of opinion, that the facts of this case imply a tenancy from year to year, and therefore this action is maintainable.

Rule absolute for a new trial.

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The King *v.* The Justices of Worcestershire.

*Wednesday, June* 18.

Where ex-overseers of the poor, delivered to succeeding overseers, a certificated balance sheet of the *gross sums* received and disbursed during the year in which they were in office, without any other voucher or document: Held, that this was not a sufficient compliance with 17 *Geo.* 2. c. 38, and mandamus issued to the Justices to hear and determine a complaint for not properly accounting pursuant to the statute.

On shewing cause against a rule nisi, for a mandamus, to the Justices of *Worcestershire,* commanding them to proceed to hear and determine the complaint of *T. Forester,* D. D., against the late churchwardens and overseers of the poor of the parish of *St. John in Bedwardine,* in the county of *Worcester,* for not signing, passing, and delivering to the succeeding overseers and churchwardens, an account in writing of their receipts and payments of money in the year during which they were in office, conformably to the provisions of 17 *Geo.* 2. c. 38, the case was this:—The late overseers of the parish had been summoned before the Justices, for not having signed and passed their accounts, in pursuance of the statute, when it appeared, that one of the overseers had, on the 1st *April* last, delivered into and verified, before a Justice of the Peace, a piece of loose paper, purporting to be an account of the receipts and disbursements, for the year 1822, containing merely the gross sums of money levied and disbursed during the year, without any other document or voucher. The Justices were of opinion, that although the account thus certified, was

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not such as was required by the statute, yet inasmuch as some sort of account had been rendered by the overseer, they had no authority to proceed in the complaint, and compel the delivery of a more full and proper account, and therefore dismissed the summons. The affidavits, on the part of the overseers, stated, that the accounts had always been certified by the overseers of *St. John's*, in the way mentioned, and that the accounts had been regularly kept in books, which books were handed to the new sets of overseers when successively appointed. The question now was, whether the mere delivery in, and certifying a balance sheet of the receipts and disbursements, was a sufficient compliance with the statute, which requires, that the churchwardens and overseers of the poor, shall yearly, and every year within fourteen days after other overseers shall be nominated and appointed to succeed them, deliver into such succeeding overseer, a just, true, and perfect account in writing, fairly entered in a book or books kept for that purpose, and signed by the said churchwardens and overseers, of all sums of money by them received, or rated and assessed, and not received, &c.; which account shall be verified by oath before one or more Justice, &c., and in case they refuse so to do, it shall be lawful for any two or more Justices of the Peace, to commit him or them to the common gaol, until he or they shall have given such account.

*Puller* and *Campbell*, shewed cause against the rule, and contended, that inasmuch as it had been determined by this Court in *Rex* v. *Carrocke* (*a*), that if any account has been rendered before the Justices, although imperfect, the Justices could not take any steps to commit the overseers under the provisions of 43 *Eliz.* c. 2, a mandamus would not lie. In this case an account of the gross sums received and expended had been rendered, which was sworn in the affidavits to have been always the usual and accustomed mode of rendering the overseers accounts, in the parish of *St. John.*

(*a*) 1 Bott. P. L. 299. Show. 395.

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It was also sworn, that the accounts were kept regularly, and passed from one set of overseers to another, and that the accounts were always accessible to the parishioners.

Abbott, C. J.—That certainly will not do. Delivering in a summary or balance sheet of the monies received and expended, is not such an account as the statute requires. The overseers must do a great deal more than they appear to have done in this case. They are to give to the succeeding overseers a just, true, and perfect account in writing, fairly entered in a book or books, to be kept for that purpose, of all sums of money by them received, or rated and assessed, and not received. Now, a mere balance sheet will not shew what sums have been rated and assessed, and not received. The overseers clearly ought to verify and deliver over the sort of account required by the very terms of the statute. The usage stated in the affidavits cannot dispense with the provisions of the act of parliament.

The other Judges concurred.

Rule absolute.

*Russell* was to have argued on the other side.

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The King v. William Mead and Robert Belt.

*Wednesday, June* 18.

Certiorari refused to remove an indictment of murder from *Yorkshire*, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded to the indictment), could not have a fair and impartial trial in the former county.

These persons were indicted of murder, at the last *Spring* Assizes for the county of *York*, before *Holroyd*, J., and after a Plea of Not Guilty, and issue thereon, a motion was made to postpone the trial until the following Assizes, on the ground that certain statements had appeared in different newspapers, tending to excite a prejudice against the prisoners, and prevent them having a fair and impartial trial. The trial was accordingly postponed, and on a former day in this Term *J. Williams* obtained a rule nisi, for a certiorari, to remove the proceedings into this Court, in order to a trial either at bar, or in some county other than *Yorkshire*, on the ground that the prisoners could not have

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a fair and impartial trial in the latter county. The affidavits in support of the motion disclosed circumstances from which the Court might be induced to think that the prisoners could not have an impartial trial in the county of *York*. Inflammatory and exaggerated statements respecting the supposed conduct of the prisoners, had appeared in the county papers, and printed hand bills containing matter of the like tendency had been circulated in, and in the neighbourhood of *Scarborough*, where the prisoners had resided, and also in different parts of the *East* and *West* ridings of the county of *York*, but it appeared that all these publications had taken place before and during the last Assizes, and none were alleged to have been published since that time.

*D. F. Jones*, now shewed cause against the rule, and submitted, that the Court had no authority to remove an indictment under the circumstances of this case. He could find no precedent of a certiorari granted to remove an indictment of felony from one county to another after plea and issue. He admitted, that in cases of misdemeanor, the practice of removing by certiorari, in fit and proper cases, had obtained, *Rex* v. *Hunt* (*a*), and also that there were instances of removal by certiorari of indictments for felony from Courts of Quarter Sessions and local jurisdictions, *Rex* v. *Thomas* (*b*). There were several objections to the present motion, independently of its novelty, which would induce the Court to hesitate before they granted it, even supposing they had authority so to do. In the first place, the case was at issue in the county of *York*, and the witnesses for the prosecution were bound over to give their evidence in that county. But supposing the Court should award a trial at bar, the prisoners could derive very little advantage from it, because, still the case must be tried by a Jury of the freeholders of *York*. The recognizances of the

(*a*) 3 B. & A. 444.

(*b*) 4 M. & S. 442. See the cases there cited.

witnesses could not compel them to attend in this Court, or in any county other than *Yorkshire,* and this Court had no power to bind then over in fresh recognizances. But independently of this difficulty, the expences of the prosecution could only be awarded by the Justices of Assize in the county in which the prisoners are tried, 58 *Geo.* 3. c. 70; and therefore if the trial was had at bar, this Court had no power to grant expences, which would subject the prosecutors to great hardship. But considering this as an application to the discretion of the Court, without regard to the strict rules of law, still the Court ought not to act upon it, unless it appeared that the persons connected with the prosecution, were privy to the publication, which it was said would tend to prejudice the prisoners on their trial. No imputation of that kind was suggested. Beside this, the present application came too late. This motion might have been made in *Easter,* but it was not presented to the notice of the Court until the close of *Trinity* Term. It was further to be observed, that no publication of the nature complained of, had taken place since the last assizes, and therefore there was every reason to suppose that the public excitement alluded to had subsided. Another objection, which seemed insuperable was, that the prisoners had been arraigned, and had put themselves on the country in the county of *York.* The prisoners, therefore, could not be tried in another county upon that arraignment, and if they were brought up by habeas corpus, to be arraigned a second time, which was necessary to a trial in any other county, it would be error on the record. This, therefore, was an attempt to delay justice without sufficient ground. At all events the venue could not be changed until the prisoners were arraigned a second time, and it was a matter of considerable doubt, whether the venue could be changed out of Term.

*J. Williams* and *Archbold* contrà, insisted that there was no doubt whatever of the power of the Court to grant a certiorari for the removal of an indictment for felony, in

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order to a trial at bar. For this they cited *Bac. Abr.* tit. *Certiorari*, 4 *Vin. Abr.* 345. 356. *Rex* v. *Wells* (a), *Rex* v. *Elford* (b), *Tyndal's* case (c), *Rutabie's* case (d), *Rex* v. *Althoes* (e), *Rex* v. *Thomas* (f), *Rex* v. *Thompson* (g). There was no doubt that this Court had power to grant a certiorari to Courts of Oyer and Terminer. *Fitzherbert N. B.* 246. A. B. H. *Rex* v. *Sidney* (h), *Rex* v. *Morgan* (i), and *Rex* v. *Wells* (k). The only question therefore was, whether, under the circumstances of this case, the Court would interpose with a view to the due administration of justice. It was clear that if an impartial trial cannot be had in the proper county, it is ground for a certiorari. *Rex* v. *Fawle* (l), *Rex* v. *Thomas*, and *Rex* v. *Hunt*. In the present case publications of a most inflammatory description had been circulated throughout the county of *York*; great prejudice had been excited against the prisoners, and they distinctly swore to their information and belief, that they could not, in consequence of these publications, have a fair and impartial trial in that county. The objections suggested on the other side could not prevail against this motion. There was no doubt that the prisoners might plead over again in this Court, although the certiorari would only remove the indictment, and as to the witnesses, there was nothing to prevent this Court from binding them over again to appear at the trial, in the place which the Court should direct. It was a sufficient ground for this Court to interfere, if the prisoners had not even a probable chance of a fair and impartial trial, but under the circumstances of this case, it seemed almost impossible that the ends of public justice could be satisfactorily attained in the county of *York*.

(a) 1 Str. 549.
(b) 2 Str. 877.
(c) Cro. Car. 252. 261. and 291.
(d) 2 Hale, 212.
(e) 8 Mod. 135.
(f) 4 M. & S. 442.
(g) 21 Vin. Abr. 177.
(h) 2 Str. 1165.
(i) 2 Str. 1049.
(k) 1 Str. 549.
(l) 2 Ld. Raym. 1452. See *Rex* v. *Webb*, 2 Str. 1068. *Rex* v. *Harris*, 3 Burr. 1330. *Poole* v. *Bennett*, 2 Str. 874, and *Rex* v. *Amery*, 1 T. R. 363.

Abbott, C. J.—The Court is placed in a situation of great difficulty. On the one hand, if we do not grant the writ, there is a possibility that those who shall be assembled as Jurors on the trial of these prisoners, may, through the great and grievous misconduct of the person who has sent forth these publications to the world, come to the discharge of their duty with minds not entirely unbiassed. On the other hand, if we should grant the writ, one effect of it must be, delay in the administration of justice. Another probable consequence of it will be, if a trial is granted in another county, or at the bar of this Court, that those who have instituted this prosecution, will, through want of means, be obliged to abandon it. The difference in the expence of a trial taking place under a writ of certiorari, and a trial at the next assizes for the county of *York*, must be very great, beside the difficulty of obtaining witnesses and carrying them down to another county. This is the state of things on the one hand and on the other. In considering these circumstances, we must not forget that the prisoners might have applied to us at a much earlier period. It was in their power to do so, and I think the application might have been made with much more reasonable probability of success at the commencement of *Easter*, than so late in this Term. These publications will have occurred at a period of five months before this trial can take place in the county of *York*, and therefore we think our best and most discreet course is, not to grant the writ, but to rely upon the confident hope, that those persons who shall be assembled in the county of *York* for the discharge of their duty as Jurors, will take care to prevent these improper publications from having any weight on their minds. I think we may confidently hope, that in a serious case of this kind, the Jury will guard themselves against acting upon preconceived impressions.

The other Judges concurred.

Rule discharged.

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The King *v.* The Justices of the West Riding of Yorkshire.

Where a clause in a private inclosure act, gave an appeal to any person aggrieved by any thing done in pursuance of that act, "except as to such acts, determinations, or proceedings *of the commissioners*, as by the general inclosure act were directed to be final and conclusive;" and an order was made by a commissioner and *a magistrate* jointly, for stopping up a private road set out under the local act: Held, that an appeal lay to the Sessions against such order, there being nothing in the general inclosure act which rendered the decision of *justices* final and conclusive.

On shewing cause against a rule nisi for a mandamus to the Justices of the West Riding of *Yorkshire*, commanding them to enter continuances and hear the appeal of *T. R. Beaumont*, Esq. and *Diana* his wife, against an order under the hands of *M. Stocks*, Esq. and *W. Pilkington*, Gentleman, for stopping up a private road set out under 4 *Geo.* 4. "An act for inclosing lands in the manor of *Whitley*, in the parish of *Kirk Eaton*, in the West Riding of the county of *York*;" the case was this:—In pursuance of a notice published in the newspapers, Mr. *Stocks*, a Magistrate of the county of *York*, and Mr. *Pilkington*, one of the commissioners named in the act above-mentioned, held a meeting for the purpose of hearing any objections which might be urged to any of the roads set out by the commissioners appointed by that act; and the commissioners having set out a certain private carriage and occupation road, in which Mr. and Mrs. *Beaumont* were interested, the matter was heard by the gentlemen above-mentioned, who determined that such road ought not to have been set out, and by their order disallowed the same. Against this order Mr. and Mrs. *Beaumont* appealed, but the Sessions dismissed the appeal, on the ground that they had no jurisdiction. The question now was, whether by the private inclosure act, by reference to the general inclosure act, 41 *Geo.* 3. c. 109, (which it recited), the order in question was such an act, determination, or proceeding, against which an appeal would lie. By s. 44, of the private inclosure act, it is enacted, "that if any person or persons shall think himself, herself, or themselves aggrieved by any thing done or omitted to be done in pursuance of the said recited act, or of this act, *except as to such acts, determinations, or proceedings of the said commissioner*, as are by the said recited act, or this act, directed to be final, binding,

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or conclusive, and also except as to such claims, objections, matters, and things, as by this act are directed or authorised to be ascertained, settled, tried, or determined by the verdict of a Jury, he, she, or they may appeal to the General Quarter Sessions of the Peace for the West Riding of the county of *York*, within four calendar months next after the cause of complaint shall have arisen; and the said court of Quarter Sessions are hereby authorised to determine such appeal, and to award such costs as to them shall seem reasonable, which determination shall be final and conclusive, and shall not be removed or removeable by certiorari, or any other writ or process whatever. By s. 8, of the general inclosure act, 41 *Geo.* 3. c. 109, the commissioners, before making any allotments, shall appoint public carriage roads, and prepare a map thereof to be deposited with their clerk, and give notice thereof, and appoint a meeting, at which, if any person shall object, "the commissioners, together with any Justice or Justices of the Peace of the division, shall, according to the best of their judgment upon the whole, order and finally direct how such carriage roads shall be set out." Then follows a proviso as to old and accustomed roads, "Provided always, that in case the commissioners shall be empowered to stop up any old or accustomed road passing, &c. the same shall in no case be done without the concurrence and order of two Justices, and which order shall be subject to an appeal to the Quarter Sessions in like manner, &c. as if the same had been originally made by such Justice as aforesaid." And by s. 10 of the same act, the commissioners are empowered to set out and appoint such private roads, &c. as they shall think requisite, giving such notice, and subject to such examination as to any private roads or paths as are required in the case of public roads, &c.

*Littledale* and *T. Blackburn* now shewed cause against the rule. The question turns upon the words of the private inclosure act. By s. 44, an appeal is given to all persons aggrieved by any thing done in pursuance of that act, except

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as to such acts, determinations, or proceedings *of the commissioners* as are by the general inclosure act directed to be final, binding, or conclusive. Now it is clear by s. 8 of the general inclosure act, which applies to setting out *public* roads, that the order of the commissioners, or Justice or Justices of the division, shall be final and conclusive; and section 10, which relates to the setting out of private roads, must be read in the same way, because it expressly subjects the proceedings of the commissioners to the like provisions as in the case of a public road, and consequently the order of the commissioners and Justices would in that case be final and conclusive. The case of *Rex* v. *The Dean Forest Inclosure Commissioners* (*a*), is a decisive authority for this construction. There is, however, a slight distinction in this case, but which makes no difference. The exception here is, as "to such acts, determinations, or proceedings of the *said commissioners*, as are by the said recited act, or this act directed to be final, binding, or conclusive." Now the order in this instance is not an act, determination, or proceeding of the commissioners, but of a commissioner *and a magistrate* conjoined. It may be true that it is an act of a commissioner, but it is not an act of a commissioner alone; it is an act of a commissioner and another person, and à fortiori it comes within the operation of the 8th and 10th sections of the general inclosure act; which makes the decision of the commissioners and justices conjoined, final and conclusive with respect to both public and private roads. The case of *Rex* v. *The Justices of Cumberland* (*b*), is perfectly distinguishable from this, because there the matter at issue did not fall within the excepted determinations which were declared by the general inclosure act to be final and conclusive. On these grounds, the Sessions did right in refusing to hear the appeal.

*Scarlett*, contrà. This is an appeal from a decision, not of the commissioners, but of a commissioner and a ma-

(*a*) 2 M. & S. 80.——(*b*) 1 B. & C. 64.

gistrate, for stopping up a *private* road, and therefore the case does not come within the 8th section of the general inclosure act, which applies exclusively to public roads. It may be true, that the joint order of the commissioners and Justices is by that section declared to be final and conclusive; but non constat that the 10th section which relates to private roads, takes away the appeal. That section only declares, that the setting out of a private road shall be subject to such notice and examination as are required in the case of a public road; but there is no declaration that the order of the commissioners in such cases shall be final and conclusive, and therefore the Court cannot by mere inference say, that because the appeal is taken away in the case of a public, it is also taken away in the case of a private road. Express words are necessary to take away the right of appeal; and as there is no declaration that the judgment of the commissioners shall be final and conclusive as to a private road, it seems reasonable that in this case an appeal ought to lie. Had this been a determination of the commissioners alone, perhaps there might be some weight in the argument on the other side, but it is an order of a commissioner and a justice. The exception in the 40th section of the private act, relates to the determination of *commissioners* only, and has no reference to the order of commissioners *and magistrates*; and there being no clause in the public inclosure act which makes the determination of *the justices* final and conclusive, it is obvious that the appeal is not taken away in this case.

Abbott, C. J.—I own I am of that opinion. The 40th section in the private inclosure act declares, "that if any person shall think himself aggrieved by any thing done or omitted to be done in pursuance of the general inclosure act, or of this act, *except* as to such acts, determinations, or proceedings of *the said commissioners* as are by the said recited act or this act directed to be final, binding, or conclusive, &c. he may appeal, &c." Now the exceptive part of this

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clause does not mention *Justices*, but refers exclusively to such acts, determinations, and proceedings of *the commissioners* as by the recited act are declared to be final and conclusive. I cannot say, therefore, that this order, which is not made by a commissioner alone, but by a commissioner and a justice conjointly, comes within the exception. There is nothing in the general inclosure act which makes the determination of the Justices final and conclusive. On the contrary, at the conclusion of the 8th section, which relates to the stopping up of old roads, it is expressly provided that the decision of two Justices, in concurrence with the commissioners, for stopping up an old or accustomed road, shall be subject to an appeal to the Sessions. I therefore think this rule must be made absolute.

The other Judges concurred.

Rule absolute.

*Wednesday, June 18.*

In the Matter of Bromley, a Bankrupt.

Where a bankrupt was, after repeated examinations, finally committed by the commissioners for not satisfactorily answering, the Court granted a mandamus conditionally to the commissioners to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of fully disclosing his estate and effects.

*Denman* had on a former day obtained a rule nisi for a mandamus to commissioners of bankrupt, commanding them to issue their warrant to bring up the bankrupt, at his own instance, to be examined further touching his estate and effects. The bankrupt had been committed for not satisfactorily answering at a previous examination, but was now ready to make the disclosures required, and the commissioners having declined a further hearing, this application became necessary.

*Wilde* shewed cause, and suggested, that the commissioners had given the bankrupt repeated opportunities of making a full disclosure of his estate and effects, and at his own instance, had ordered him to be brought before them for that purpose, but in consequence of his unsatisfactory

answers they had remanded him finally. They were now ready and willing to afford him another opportunity of disclosing the real state of his affairs, if he would only suggest some reasonable ground of probability, that his examination would be satisfactory.

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PER CURIAM.—Let the rule be made absolute for a mandamus, but no writ must issue without an order from a Judge for that purpose. In the mean time, the bankrupt may suggest to the commissioners the grounds upon which he desires to be further examined, and if they shall then decline to issue their warrant to bring him up, an application may be made to a Judge at Chambers for an order that the writ of mandamus do issue.

Rule absolute conditionally.



The KING *v.* THOMAS DOLBY.

*Wednesday, June 18.*

THIS was an indictment for a libel. The case came on to be tried before *Abbott*, C. J., and a Special Jury, at the *Middlesex* adjourned Sittings after *Michaelmas* Term, 1821. When the Special Jury panel was called over, two only of the Special Jurors were in attendance. The counsel for the Crown then prayed a tales; upon which the defendant put in a challenge to the array of talesmen, for unindifferency in one of the sheriffs of *Middlesex*, on the ground, that at the time of forming the tales panel, he was one of the prosecutors of the indictment. The counsel for the

After a tales panel, on an indictment for libel (appointed to be tried by a Special Jury), had been quashed for unindifferency in the sheriff: Held, that a venire facias juratores might be awarded to the coroners, though two of the Special Jurors summoned had attended on the former occasion.

Upon the prayer and award of a tales de circumstantibus at Nisi Prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the bye-standers accidentally in Court; they may be selected out of persons previously appointed by the coroner or sheriff, to be in attendance, in the expectation that a tales would become necessary.

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prosecution immediately took issue upon the challenge, and thereupon the Court appointed the two Special Jurymen who appeared, as triers, and they having found the sheriff unindifferent, the panel was quashed, and the cause was struck out of the paper. In *Hilary* Term, 1822, a rule was obtained for directing new Jury process to the coroners of the county of *Middlesex* (a), which was accordingly done, and the cause was again set down for trial on the 26th *February* last. On that occasion, several persons who had been summoned by the coroner, attended to form a panel de circumstantibus, and the case having been called on, and only two Special Jurymen having appeared, the prosecutor prayed a tales. The defendant's counsel objected, that there ought to have been a writ of octo or decem tales, but that objection was over-ruled, and the learned Judge commanded the coroners to summon instanter, such of the bye-standers as they thought proper, to form a tales de circumstantibus. But as one of the coroners only was present, the defendant's counsel objected that this could not be done, because as the Jury process was directed to both the coroners, the return could only be made by both, and the learned Judge being of opinion that this was a fatal objection, the case was again made a remanet. The cause came on a third time for trial at the adjourned Sittings after last *Trinity* Term, when six Special Jurymen having appeared, among whom were the two who originally attended, a tales was again prayed, but the defendant's counsel objected to the coroners return, upon the ground, that as two Special Jurymen had appeared when the cause first came on for trial, the coroners should have summoned others to have made their number complete, instead of summoning an entire Jury de novo. It was also objected, that the tales had been improperly returned, inasmuch as they had been summoned by the coroners, by letter, to attend, whereas they ought to have been indiscriminately selected de circumstantibus according to the statute 35 *Hen.* 8. c. 6. These tales,

(a) Ante, vol. i. p. 145.

were in fact taken from the ordinary common jury panel, from which talesmen are usually called. The learned Judge, however, over-ruled both objections; the trial proceeded, and the defendant was found guilty.

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*Scarlett*, in *Michaelmas* Term last, obtained a rule nisi, for a new trial, upon three grounds. First, that the talesmen had been previously summoned by the coroners by letter, instead of being taken from among those who were accidentally present; second, that the whole Special Jury had been summoned by the coroners, whereas a writ of decem tales ought to have been awarded; and, third, that there were two venires upon the record, which rendered the proceeding irregular.

*Gurney* and *Tindal*, on a former day in this Term, shewed cause. To support the first objection, it must be shewn, that the coroner has no power to summon individuals to attend in Court, for the purposes of the administration of justice, and that the tales in this case ought to have been, and in every case by law, must be persons accidentally and unpremeditatedly present. This position, however, cannot be maintained, either by dicta or by precedents, and will be found, upon examination, to embrace a most inconsistent and dangerous doctrine. How is it possible for the coroner to know the character of persons who might thus attend, the motives which brought them thither, or their connexion with the parties in the cause? If Jurors were to be indiscriminately chosen, every defendant would have it in his power to poison the fountain of justice, because he might induce such persons to be present as were his own friends and partizans, and who would come resolved to find a verdict of not guilty, whatever might be the evidence before them. It may be said, that the power to summon the Jurors, is a dangerous power in the hands of the coroner, and that it includes within itself the liability to act corruptly. Such a position is absurd and unjust. Every pub-

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lic officer, whatever may be the nature of his office, must be deemed pure until the contrary is shewn, and the Court always does, and in common fairness must assume, that he discharges his duty with honesty and impartiality. It is not pretended that the tales in this case were in any respect personally objectionable, nor that any corrupt or improper conduct had been employed in their selection; and therefore, in the absence of evidence to that effect, the Court will presume, that every thing has been done fairly. If the coroner, in this instance, has offended at all, he has been guilty of that which is mentioned in many of the old writers as an offence, namely, embracery. But in order to convict a party of that offence, he must be proved to have acted from a corrupt and criminal motive. *Bac. Abr.* tit. *Juries, Judgment in Attaint* (3), and the authorities there collected. In this case, therefore, it is clear that the coroner cannot be charged with embracery, for he was perfectly disinterested, was acting merely virtute officii, in obedience to a rule of court, and perfectly free even from any suspicion. If he is not guilty of embracery, he is guilty of no offence; he has simply performed his duty in guarding against the possible emergency of a deficiency in the Jury, and thereby to prevent any impediment in the administration of justice. Then the second objection will be found equally unsupported. It is, that entirely new Jury process was awarded, instead of issuing a writ of decem tales, in order to add them to the two jurors who appeared on the former trial. But it is quite clear that the coroner has pursued the only course open to him since the statute 3 *Geo.* 2. c. 25. At common law neither Special Juries nor tales de circumstantibus existed. Before that statute, the process was a venire habeas corpus and distringas, and if a tales was awarded, the habeas corpus or the distringas was re-issued, with an order to add to those previously summoned by the venire octo decem, or other tales, as the case might be. The 35 *Hen.* 8. c. 6. s. 5, gave the tales

de circumstantibus in civil actions only, which, however, the 4 & 5 *P. & M.* c. 7, extended to prosecutions at Nisi Prius. Then the 7 & 8 *Will.* 3. c. 22. s. 3, (which was an act for the ease of jurors) provided that the sheriff should return for talesmen, such persons as shall be returned upon another panel, to serve as jurors at the same assize. And lastly, the 3 *Geo.* 2. c. 25, directed the same panel to be annexed to every venire, and declares, in section 15, that the Jury struck by the parties shall be the Jury to try the cause. It has been decided, on that clause, that if, after a Special Jury has been struck, the cause goes off for want of jurors, no new Jury can be struck, but the cause must be tried by the Jury first appointed. *Rex* v. *Perry* (*a*). Now, if a writ of decem tales had been awarded in this case, it would have been impossible to comply with the requisites of the statute, and the case just cited is a direct authority to shew, that such a mode of proceeding would have been irregular. In point of fact, the same two Special Jurors who attended on the former trial, attended also at the latter, so that the persons added to them, were precisely the same persons as would have served if the writ of decem tales had been awarded. If this objection could prevail, it would go to annihilate the whole system of Special Juries. At common law there is no Special Jury, nor are there any tales de circumstantibus; the statute of 3 *Geo.* 2, gave the Special Jury, but it did not admit of the writ of decem tales, and therefore the only mode of making up a deficient Special Jury, is by supplying others from the panel of common jurors. Indeed, by the very provisions of the statute, that mode becomes necessary, because, as the Special Jury first struck, must be *the* Jury to try the issue, if an imperfect Jury appears, and the cause goes off, to make it up from an octo or decem tales, would be to constitute another, and not the same Jury, and would be to violate the express provision of the statute. But the defendant has no reason to complain of the adoption

(*a*) 5 T. R. 453.

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of this course in the present case, because he has, by his own conduct, rendered it necessary. He has suggested the fact of the unindifferency of the sheriff; that suggestion appears upon the record, and is acquiesced in by him as a fact, and upon that is founded an award of process to the coroners. There is, therefore, no ground for objecting either to the Jury themselves, or to the mode in which they have been chosen, and as they have properly tried the cause, and regularly found their verdict, there is no pretence for this objection. Then, thirdly, there is no case which goes the length of proving that there may not be two venires on the record. In *Symonds* v. *Walsh* (*a*), the judgment, indeed, was reversed, but only upon the ground that the venire was awarded to the wrong person; and in *Pretious* v. *Robinson* (*b*), the Jury was chosen from two different panels, which were returned to the two venires, and there was no reason assigned for the issuing of the second venire. But it has been more than once held, that where the sheriff is unindifferent, a second venire may be issued, *Rex* v. *The City of Worcester* (*c*), and *Willoughby* v. *Egerton* (*d*), and therefore as there is a suggestion here, which is not denied, that the sheriff was unindifferent, the second venire was properly issued to the coroners, and the whole course of proceedings has been perfectly correct. There is, therefore, no ground for the present application.

*Scarlett* and *J. Evans*, in support of the rule. The principle upon which the objections to the Jury process in this case are founded, has been hitherto wholly overlooked. It is this: that as it has been decided that the defendant cannot challenge the array of a Special Jury, *Rex* v. *Edmonds* (*e*), the return of the tales in making up a Special Jury, must be regulated according to the provisions of the statute which first gave the Special Jury itself; which has not been done

(*a*) Cro. Jac. 547.
(*b*) 2 Vent. 173.
(*c*) Skin. 105.
(*d*) Cro. Jac. 35.
(*e*) 4 Barn. & Ald. 471.

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in the present instance. The objection taken at the first trial, therefore was, not to the Special Jurymen, but to the tales, returned by the sheriff, and consequently there would be no fresh award except with reference to the tales. If both the coroners had been present in Court when that objection was taken, the Judge might, under the statute 35 *Hen.* 8. c. 6, have ordered them to return instanter a panel of tales de circumstantibus, to supply the deficiency of that particular Jury, but no fresh Jury would then have been summoned, and no new process awarded. But only one coroner being present, the cause necessarily went off, and new process became necessary, but that could properly authorise no more to be done than would have been done in Court, if both the coroners had been present. It is admitted, that by 3 *Geo.* 2, the Jury first struck must be *the* Jury to try the cause, and therefore an award of a venire to summon a second Jury was clearly a violation of the statute. [*Bayley*, J. That would be ground of error, if it was an objection at all; it cannot be urged, in support of the present motion.] It cannot be ground of error in the present case, because the Special Jury process does not appear upon the record; but it is equally an irregularity, because the award to the coroner is in general terms "to cause to come twelve good and lawful men," which is inconsistent with the principle which characterises the selection of a Special Jury. If the original objection had been to the Jury in toto, the proceeding which has been adopted might have been correct; but the objection was to the tales only, and therefore the common-law process was the only course left open to the coroner. But this process was altogether irregular, because the effect of it was to put two venires upon the same record, upon one of which something has been done. It is quite clear, that where any thing has been done upon one venire, and has not been objected to, that process must be amended and made complete, and another cannot be awarded; for the two venires cannot

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exist upon one record. *Pretious* v. *Robinson* (*a*), *Willoughby* v. *Egerton* (*b*), *Pigot* v. *Pigot* (*c*), *Symonds* v. *Walsh* (*d*), and *Rex* v. *Franklin* (*e*). The remaining objection is still stronger, and more general in its application, namely, that the coroner, in taking upon himself to summon the Jury, has assumed a right which the law has vested in the parties to the cause themselves, and which in his hands may be abused. The Court will, it is true, presume him to have done right, until the contrary is shewn, but this is no answer to the objection. Upon such a subject every thing is to be presumed in favor of the defendant, and against the officer, because the latter has at least the power to do wrong, and the former is deprived of all control or restraint over him. The legislature have shewn that they would presume that a Jury might be packed, and therefore it was that they passed the statute, giving the tales de circumstantibus. 2 *Hawk. P. C. lib.* 2. c. 41. ss. 20, 21. The object of the law has always been to prevent the possibility of partiality, or any thing approaching to a selection by the officer. Here the coroner not only returns a Special Jury in the first instance, but also a number of persons whom he has chosen to serve as tales. The coroner had no right to presume, that a sufficient number of Special Jurors would not attend. The most dangerous consequence might ensue, if he were allowed to act on that principle. Possibly the very persons whom the defendant has previously challenged might be selected by the coroner as tales, and might be the very men to try his cause. [*Bayley*, J. This argument is merely saying that every public officer *may* abuse his authority.] It is shewing *how* he may, and the possibility of abuse is enough to support the objection (*f*). Even at common law none could be summoned on the tales without affording to the party accused the opportunity of knowing

(*a*) 2 Vent. 173.
(*b*) Cro. Eliz. 853.
(*c*) Cro. Car. 531.
(*d*) Cro. Jac. 547.
(*e*) 5 T. R. 451.

(*f*) Vide Dyer, 367. 5 Co. Rep. 36. b. Godbolt, 426. Roll. Abr. Trial, 669. Vin. Abr. Trial, 305.





before hand who they were; and the 42 *Edward* 3. c. 11. expressly declares, that the names of the persons who are to serve on the inquest shall be returned into Court. It has been held, that that statute applies to both civil and criminal cases, 2 *Hawk. P. C. lib.* 2. c. 41. s. 21, and if the coroner has the power of summoning the Jury privately, and of his own mere motion, that statute would be in effect repealed. If the coroner has this power, what is there to prevent the sheriff from exercising it in all criminal cases; because the statute 7 & 8 *Will.* 3. c. 32. applies exclusively to civil cases? A tales de circumstantibus means, ex vi termini, a Jury of persons taken from those who are accidentally present. Neither the sheriff nor the coroner had any power to compel the attendance of persons so selected. If they had such power, the legislature would have provided some process for that purpose. For these reasons, it is clear, first, that the coroners had no authority to summon previous to the trial a tales de circumstantibus; second, that it was illegal to summon a Special Jury de novo; and third, that there being two venires on the record, the proceedings are altogether irregular, and the defendant is entitled to a new trial.

The Court took time to consider of the case, and judgment was now delivered by

Abbott, C. J.—This was an application for a new trial. Two objections were taken to the proceedings, first, that the award of a venire facias juratores to the coroners, after a previous award of the like process to the sheriffs, which had in fact been acted upon, was an irregularity; and, second, that upon the prayer and award of a tales at the trial, and under which the cause was in fact tried, the tales ought to have been taken out of persons accidentally present in Court at the moment, without any previous measures adopted by the coroners to insure the attendance of persons whom they thought proper to constitute the tales, if a tales should

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become requisite. The first of these objections was discussed much, upon the supposition that the process directed to the coroners, demanded them to summon other and distinct persons, from those who had originally been summoned by the sheriffs. The language of the record, however, does not justify that position, for the coroners are commanded only "to cause to come twelve good and lawful men;" they are not described as twelve *other* good and lawful men, and this being in fact a Special Jury cause, (although that does not appear upon the record), the original panel returned by the coroners contained, as it ought, the very same names, and no others, as were contained in the panel returned by the sheriffs, being the persons nominated under the rule of Court, and in conformity with the statute. The whole proceeding, therefore, was in substance and effect, the same as if an octo or decem tales had been awarded according to the ancient practice, prior to the acts of parliament, which gave the tales according to the mode now in use. From this it appears, that in point of fact, the cause has been tried by the very principal jurors by whom, as it is contended for the defendant, it ought to have been tried. We are therefore of opinion, that there is not any sufficient foundation for this objection, either upon or dehors the record. As to the second objection, namely, that the coroners should have taken the tales from such persons as might happen to be present, and ought not to have summoned any persons of whom they might make a panel, we are also of opinion, that this objection ought not to prevail. At the trial, no objection was taken to the persons who had been summoned, and who appeared, nor was it suggested that the coroners had, in the particular instance, acted from any improper motive or design. The objection was founded altogether upon general principles, and upon the supposed danger of permitting a sheriff, or a coroner, to secure the attendance of persons nominated by himself, and by those means, in effect, to select a part of the Jury. Now, this objection is evidently contradictory to the whole principle and prac-

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tice of the common law in this matter. By the common law, the person to whom the Jury process was directed, whether the sheriff or coroner, chose whom he could summon to attend and place on the panel, and if a full Jury did not appear, and an octo or decem tales was awarded at common law, the sheriff, or coroner, also selected the persons in execution of that process. The common law admits no such absurdity, as the taking by chance and hazard, those persons who are to discharge the solemn and important duties of Jurymen; but has provided that it shall be done by some known and responsible officer, who may be forthcoming, and punishable if he shall act amiss. Even the 35 *Hen.* 8. c. 6. which gave the tales de circumstantibus, as it is usually called, leaves a discretion to be exercised by the officer, and the provision was made, as appears plainly by the language of the fifth section, "for the more speedy trial of issues," and not, as was suggested in argument, for the prevention of partiality. And by section 6, the sheriff, or other minister, is to name and appoint so many of such other able persons of the county as may be present at the said assizes, or Nisi Prius, as shall be sufficient to complete the number of Jurors required. Nomination and appointment, necessarily imply selection, and therefore in that case a discretion is left to be exercised by the officer, though the persons out of whom that selection is to be made are limited of necessity to such as may happen to attend at the assizes, or Nisi Prius. It was well observed, in argument, on the part of the prosecution, that the course of proceeding adopted by the coroners in this case, is infinitely more free from the probability of an unfair trial, than the taking the tales from those who are accidentally present in Court would be; because in the latter case, either party may take measures to fill the Court at the time of trial, with his own personal friends and partisans. For these reasons we are of opinion, that the rule for a new trial ought to be discharged.

Rule discharged.

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## Clark, Administratrix of John Clark, deceased, *v.* Hougham (*a*).

A landlord having tortiously received from several of his tenants various sums of money, one of the tenants, after the lapse of six years, applied to have the money refunded. To this the landlord replied "that if there was any mistake, it should be rectified:"—Held, that this was such a recognition of liability as would take the case out of the statute of Limitations as to another tenant, although the latter had given no authority to the former to make the application on her behalf.

Where an administratrix had, after the death of her intestate, made a similar payment as above-mentioned, to the landlord, out of assets in her hands:—Held, that although it might be a wrongful payment, yet she might sue as administratrix to recover it back.

If a plaintiff relies upon fraud, as an answer to a plea of the statute of Limitations, it must be specially re-pleaded, and cannot be taken advantage of under the common replication, that the defendant did promise within six years.

Where the evidence of the payments above-mentioned, consisted of memoranda of accounts delivered to the tenant, in which the items in question were set down, and to each of which was written by the landlord the word "paid;"—Held, that such memoranda were admissible, without a stamp, when coupled with entries in the steward's books to the same effect.

THIS was an action of assumpsit for money had and received to the use of the intestate in his life-time; second count for money had and received to the use of the plaintiff, as administratrix, since her husband's death. Pleas, first, non-assumpsit to both counts, and to the first non assumpsit infra sex annos. Replications, similiter, and that the defendant did promise within six years, and issue thereon. At the trial before *Richards*, C. B. at the last *Lent* Assizes for the county of *Kent*, the circumstances of the case were these:—The defendant being proprietor of a landed estate in the neighbourhood of *Canterbury*, was desirous of letting the same in parcels to different tenants, and accordingly in 1802, at a public meeting, several persons, to the number of about twenty, agreed to become tenants to the defendant, of different portions of land at a certain rent. One of these persons was the plaintiff's intestate. After the rent was agreed for, it was stipulated by the defendant, that he was to pay all parochial and other assessments imposed upon the whole estate, and to reimburse himself by apportioning the whole amount among the tenants, according to the amount of their respective rents as they became due. To this all the tenants assented, and the intestate entered upon the farm

(*a*) A warrant under the Royal Sign Manual having issued ten days before the end of *Trinity* Term, pursuant to 3 *Geo.* 4. c. 102, the puisne Judges of this Court sat in a room adjoining the *Guildhall* at *Westminster*, from the 23d *June* to the 5th *July*, both days inclusive, for the despatch of business, when this and the cases following were decided.

demised to him, and remained in possession until the month of *September*, 1816, when he died. During his tenancy, the defendant was in the habit of sending to him and to the other tenants annually, before rent-day, an account of the rents, rates, and assessments which would be due upon the several farms. The charge for rates was made in those accounts, upon a rental of 3*l.* 10*s.* per acre, at which rate the intestate paid the defendant. Upon the death of the intestate, the plaintiff, his widow, continued in possession of the farm, paying the defendant the same proportion of rates as her husband had done, until the year 1820, when it was discovered that from the year 1802 downwards, the rates actually paid by the defendant upon the whole estate were calculated on a rental of only 2*l.* 10*s.* per acre. The sum sought to be recovered in this action was 330*l.* being the amount of the surcharges during the life-time of the intestate, and the period the plaintiff was in possession. Of this sum the plaintiff had paid 42*l.* within six years before action brought. Until 1820, none of the defendant's tenants knew that they had been paying him a larger sum for rates than he had actually paid. The plaintiff had not taken out administration to her husband's estate until a considerable time after his death, and the payments which she had made, were within six years before action brought. In order to take the case out of the statute of Limitations, as it respected the over payments made by the intestate, it was proved that in 1820, after the discovery of what had taken place, Mr. *Wilde*, one of the tenants, who had taken a farm of the defendant upon like terms as the intestate, called upon the defendant, and complained that he and the other tenants had been paying a larger amount of rates than they were bound to do, and insisted upon a return of the surcharges. Mr. *Wilde* was not expressly authorised by the plaintiff to make the application on her account, but he applied generally in the names of all the tenants, from some of whom he had authority. The defendant, in answer to the application, said he could say little about it, but referred Mr. *Wilde* to

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his steward, who kept the books, and added, "if there is any mistake, it shall be rectified." Application was then made to the steward, and he said, that he was not steward at the time the land was taken, and denied any knowledge of the agreement made between the defendant and the tenant upon the subject of the rates. At a second interview between Mr. *Wilde* and the defendant, the latter said, that he had agreed to be responsible to the guardians of the poor for all rates assessed upon the land, and that the overcharge was made to reimburse himself in case any of the tenants did not pay him, and he positively refused to return the sums overcharged. In order to prove these overcharges, the several accounts delivered to the intestate and the plaintiff respectively, from time to time, in which the item for the assessments was included, were produced in evidence. Upon each of these accounts the word "paid" was written either in the hand-writing of the defendant or his steward. The steward's books were also produced, in which the same items were entered as paid. On the part of the defendant it was contended, that there was no evidence to take the case out of the statute of Limitations as to the money paid by the testator in his life-time; first, because the supposed promise relied on was any thing but a promise, it being only a disclaimer on the part of the defendant, of any knowledge of the transaction, and a positive refusal to pay; and second, because the promise, if made, was not made to the plaintiff, or any authorised agent acting for her. Then as to the money paid by the plaintiff herself, it was contended, that she could not maintain this action for it, on two grounds, first, that it had not been paid by her in the character of administratrix, for at that time she had not obtained administration; and second, that she could not recover it back in her representative character, because it being paid in her own wrong, she would be responsible to her husband's estate, and could only sue in her personal capacity; lastly, it was contended, that the accounts delivered to the plaintiff and the intestate, could not be received as

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evidence, unless stamped, inasmuch as they were produced as evidence of receipts for the money now sought to be recovered. The Lord Chief Baron was of opinion, that the accounts delivered, coupled with the entries in the steward's books, were admissible evidence to show that the plaintiff and her intestate had been overcharged. The other objections, he said, he should reserve. In answer to the plaintiff's case, the defendant's steward was examined, and he deposed that the intestate had, from the beginning of his tenancy, been aware of the fact that the defendant charged 1*l.* per acre more than he paid, and had constantly acquiesced in the overcharge, as a remuneration to the defendant for the expences he had been put to in repairing the fences upon the land. This evidence was left to the Jury, and they found their verdict for the plaintiff for the full amount claimed, with liberty to the defendant to move to enter a nonsuit on the objections reserved.

*Marryatt*, in *Easter* Term last, moved accordingly, and made four points; first, that the evidence of the overcharge had been improperly received; second, that the verdict was against evidence, the defendant having proved that the intestate was aware of the overcharge; third, that there was no promise by the defendant sufficient to take the case out of the statute of Limitations; and fourth, that the action could not be maintained by the plaintiff as administratrix. Upon the two latter points, the Court granted a rule nisi, but expressed a decided opinion with respect to the two former, that the accounts had been properly received in evidence, and that it was for the Jury to decide upon the credit due to the defendant's witness.

*S. Comyn* (with whom were *Gurney* and *Lawes*, Serjt.) now shewed cause, and contended, that the conduct of the defendant in making the overcharges was of itself sufficient to take the case out of the statute of Limitations, on the ground of fraud, it not having been discovered till after the

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death of the intestate, which was within six years of action brought; but independently of this, he submitted, that the defendant's observation "if there has been any mistake, it shall be rectified," was a sufficient recognition of his liability to take the case out of the statute. Admitting that there was no express authority on the part of the plaintiff to Mr. *Wilde*, to apply to the defendant, still, *Mountstephen* v. *Brooke* (*a*), shews that an acknowledgment made to a third person is a sufficient answer to a plea of the statute; then, secondly, the plaintiff had a right to sue as administratrix; for, having occupied the land, and paid the rent in that character out of the funds of the estate, the money, when recovered, would be assets in her hands, and could be sued for by her in her representative character only. He cited *The South Sea Company* v. *Wymondsell* (*b*), and *Bree* v. *Holbech* (*c*).

*Marryatt* and *Bolland* in support of the rule, contended, first, that the plaintiff could not sue as administratrix, because as the letters of administration were taken out after the payments were made, the plaintiff had made those payments in her own wrong, and had committed a devastavit, and therefore could not recover them in a representative character; and second, that the statute of Limitations was an answer to the action in respect of the payments made by the intestate, first, because the alleged damage had accrued more than six years before the action brought; and second, because the language of the defendant, even if it amounted to a promise at all, applied exclusively to Mr. *Wilde*, to whom it was personally addressed, and had no reference to the plaintiff, who had no share in the application. Assuming there to be fraud in this case, it could only be taken advantage of by a special replication. They cited *Comyn's Digest* (*d*), *Battley* v. *Faulkner* (*e*), *Munt* v. *Stokes* (*f*),

(*a*) 3 B. & A. 141.
(*b*) 3 P. W. 144.
(*c*) 2 Doug. 654.
(*d*) Tit. Administration, I. 1.
(*e*) 3 B. & A. 288.
(*f*) 4 T. R. 561.

*Short* v. *M'Carthy* (*a*), *Ord* v. *Fenwick* (*b*), and *Webster* v. *Spencer* (*c*). 1823.

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BAYLEY, J.—It is not necessary in this case to consider whether the mere existence of fraud in the transaction, has the effect of barring the statute of Limitations, because that question is not raised by these pleadings. In order to take advantage of the alleged fraud, there should have been a special replication. The only question upon these pleadings is, when did the cause of action accrue, and upon that point I am perfectly satisfied both upon the principle of the statute itself, and according to decided cases, that the defendant has made such an acknowledgment of the debt, as raises a new assumpsit, and takes the case out of the operation of the statute. The statute of Limitations operates as a bar, on the principle, that after a certain time it must be presumed that the debt has been paid, and the vouchers lost; and therefore whenever it appears from the defendant's acknowledgment that the debt remains unpaid, its operation is barred. This construction has been acted upon in *Mountstephen* v. *Brooke* (*d*), *Douthwait* v. *Tibbutt* (*e*), and *Leaper* v. *Tatton* (*f*), in the latter of which Lord *Ellenborough* says, " As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid, be shewn, it does away the statute." Now it seems to me, that the present case falls within the rule of construction there laid down. The defendant lets different portions of land to different tenants; he agrees to pay the parish-rates, and to charge the tenants the same that he pays; and he then charges them, and they regularly pay 1*l*. per acre more than he has paid to the parish. It is

(*a*) 3 B. & A. 626.
(*b*) 3 East, 104.
(*c*) 3 B. & A. 360.
(*d*) 3 B. & A. 141.
(*e*) 5 M. & S. 75.
(*f*) 16 East, 420.

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proved, that the intestate during his life-time, and the plaintiff after his death, constantly paid this overcharge, and that the latter paid it out of and on account of the estate of the former. Then the accounts delivered, and the entries in the book of the defendant's steward, corroborate the fact of these payments, and we have therefore conclusive evidence that the money has been wrongfully received, and never returned. These facts would go a great way to take the case out of the statute; but in addition, we have the admission of the defendant, that he owes the money, and that he does not choose to pay it; for in that way do I construe his language. There could be no doubt then, that as to Mr. *Wilde*, to whom the acknowledgment was personally made, the statute was barred, and as all the tenants stood in the same situation, and were all generally alluded to in the conversation, I think the same result is produced with reference to the plaintiff. The case then is thus cleared so far as respects the payments by the intestate, and I am of opinion, that the action is equally maintainable for the payments made by the plaintiff. *Ord* v. *Fenwick* (*a*), and the other cases of that class, decide only under what circumstances an executor or administrator *may* sue; they do not define the cases in which they are disabled from suing. Even admitting that the payment of the money was a devastavit, I am still of opinion, that the plaintiff may maintain this action; for I take the rule to be, that when an administrator finds that as such he has wrongfully paid money, he may, as such, recover it. This money, when paid, was assets in the hands of the plaintiff; it was part of the funds of the estate, and ought to remain so; but if this action is defeated, it ceases to be assets, and the estate is necessarily defrauded to that amount.

HOLROYD, J.—I am of opinion that this verdict must be confirmed for the full amount claimed in this action. It is quite unnecessary, under the circumstances of this case, to

(*a*) 3 East, 104.

determine whether the existence of fraud bars the statute, and indeed it would be impossible to decide that question upon these pleadings. The ground of this action is, that the money has been wrongfully paid, and the evidence of Mr. *Wilde* fully proves that fact, and is an answer to the defendant's plea, because it proves an admission by the defendant of the overcharge, and a promise by him to refund it, with reference to the whole transaction, and to all the tenants collectively. That admission, therefore, applies to the plaintiff individually as one of the tenants. This clearly takes the case out of the statute, as to the payments by the intestate, and I am of opinion also, that the plaintiff is entitled to sue as administratrix for the money paid by herself. The payments made by her do not appear to me to have been wrongful, so far as she was concerned, though they certainly have turned out to be so with reference to the defendant, by whom they were received. The money was certainly assets in her hands when she paid it, and as assets it must continue whenever it is recovered. I am of opinion therefore that she was bound to sue in her representative character, and that if she had sued in her own name, and recovered the money in her own right, she would have been guilty of a fraud upon her husband's estate.

BEST, J.—The question of fraud has been decided by the Jury, who, acting upon the evidence before them, found their verdict for the plaintiff. By that finding we are concluded. I agree that we are not called upon to decide in this case, whether fraud, per se, is an answer to the statute of Limitations, but I think that if there had been a special replication of the fraud put upon this record, the defendant's second plea would have been answered, and that we might so have held without disturbing any of the former decisions upon that subject. In all those cases the fraud was complete, and the cause of action arose six years before action brought; but here the fraud is continued to a period far within six years. The rule of construction applicable

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to this statute in Courts of Law and in Courts of Equity, is widely different; we must abide by our own rule of construction, and wherever we find an acknowledgment that the debt is unpaid, must consider the statute as defeated. Now here, there is not only such an acknowledgment, but there is in effect a promise to pay the debt, and therefore the defendant's plea is satisfactorily disproved out of his own mouth. Then, it is said, that the plaintiff cannot sue as administratrix. For the decisive reasons given by my learned Brothers, I am clearly of opinion that she may. The rule in this case is the same that governed in *Ord* v. *Fenwick*, and *Webster* v. *Spencer*, namely, that if the money would be assets when recovered, then the administratrix may sue for it in that character. Here it clearly is assets when recovered; it was not wrongfully paid, though it was wrongfully demanded and received; it was assets when paid by the plaintiff, and ought in law and in justice to continue so.

Rule discharged.

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The KING *v.* The INHABITANTS of BYKER.

Where the owner of a colliery, by indenture hired certain workmen to be employed in the colliery for one whole year, at the wages of 1*s.* 10*d.* for a good day's work, not exceeding fourteen hours, and 2*d.* a-day additional when that time was exceeded; and they were to forfeit 10*s.* 6*d.* for every act of disobedience, and 2*s.* 6*d.* a day for lying idle, (to be deducted out of their wages), with a proviso, that the jurisdiction of the Justices should not be ousted in case of disputes; and a covenant that if at *Christmas* the master should have occasion to repair the machinery belonging to the colliery, he might stop the works at the farthest for a week, without paying any wages to the workmen, unless otherwise employed:—Held, that this was a conditional, and not an exceptive contract, and that a workman who had served under it for one whole year, thereby gained a settlement.

ON appeal against an order of two Justices, for the removal of *William Gray* and *Mary* his wife, from *Houghton-le-Spring*, in the county of *Durham*, to *Byker*, in *Northumberland*, the Sessions confirmed the order, subject to the opinion of this Court, upon the following case:—

By indenture, dated 23d *October*, 1809, between *James Potts*, of *Byker*, of the one part, and several persons

whose names or marks are thereto subscribed, (of whom the pauper, *William Gray*, was one,) of the other part, the said *J. P.* hired and retained the several other parties thereto, and they hired and bound themselves as workmen or servants, to be employed in a certain colliery, for the term of one whole year, from the 21st *January*, 1810, upon the following terms and conditions:—That the said *J. P.* should pay to every one of the said persons, for every good and sufficient day's work, not exceeding fourteen hours, in single shaft pits, 1*s.* 10*d.* per day, and 2*d.* per day extra, when that time was exceeded. And the said several persons hired and retained by the indenture covenanted with *J. P.*, that each of them would, in their several stations, diligently perform and obey his orders and directions as to the manner of working the colliery, and work the colliery fairly and regularly, as therein expressed; or in default thereof, should forfeit and lose, (to be retained out of their wages) the sum of 10*s.* 6*d.* for every act of disobedience; and also the sum of 2*s.* 6*d.* per day for lying idle, upon each hewer, deputy crane-man, on-setter, sinker, drawer, or off-handman, to be deducted as aforesaid; and for every working day which they, or any of them, so hired and bound as aforesaid, should absent themselves from their employment, or should neglect or refuse to fulfil and execute the whole of the business of an usual day's work, unless prevented by sickness or some other unavoidable cause, the defaulters should forfeit and lose (to be retained as aforesaid) the sum of 2*s.* 6*d.* for every such default, refusal, or neglect; all which said forfeitures and penalties should be deducted and retained out of the wages or earnings of each offender, at the first pay-day next after the offence should be committed. The indenture contained a proviso, that the indenture should not, nor should any covenant or clause therein contained, be construed to extend to oust or exclude any Justices of the Peace from any jurisdiction or cognizance which the statute law of this kingdom hath given to such Justices over masters and ser-

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vants; but, on the contrary, that each of the several parties thereto should be at full liberty, notwithstanding any thing therein contained, upon any breach of any of the before-mentioned covenants, to call for and require the aid and assistance of any Justice or Justices, to compel the performance, or punish any breach of such covenants, as far as by law they could or might, if the indenture had not been made. It was covenanted and agreed, that in case the said *J. P.* should think it necessary, at or about *Christmas*, 1822, to repair, alter, or amend any engines or machines of or belonging to the said colliery, or to remove or prevent any obstructions or hindrance which might have happened to the same, or to do any other thing which he, his executors, &c. should think needful to be done in the said colliery, or the working of the same, that then it should be lawful for him to stop the workings, at all or any of the pits of the colliery, for any length of time, not exceeding in the whole the space of seven days, without paying or allowing any wages or sums of money to any of the several parties who should thereby be prevented from doing their daily work, save and except such of them as should be employed by him in any other work in and about the colliery, or otherwise, who should be paid or allowed reasonable wages for such his or their other work. Under this indenture, the pauper was retained and hired by Mr. *Potts*, as a driver, and served under it for an entire year, during the whole of which time he resided at *Byker*. At the time of the hiring the pauper was under age, unmarried, and without any child. There was no evidence that he had, or had not, incurred any penalty or forfeiture during his year's service, or that any deduction had, or had not, been made from his wages. The question for the opinion of the Court is, whether the pauper gained a settlement in *Byker*, by his residence there, and his service under the indenture.

*E. Alderson*, in support of the order of Sessions, contended, on a former day, that the contract in this case was

a conditional, and not an exceptive hiring, and therefore that by a year's service under it a settlement was acquired. He distinguished this case from *Rex* v. *Edgmond* (a), *Rex* v. *Gateshead*, *Easter*, 1821, not reported (b), both of which

(a) 3 Barn. & Ald. 107.

(b) The following, however, is a note of the case from the Eds. MSS.

The King v. The Inhabitants of Gateshead.

*Easter Term*, 1821.

The owner of a colliery, by agreement, hired his workmen for a whole year, but they were not to be required to work during ten days in the *Christmas* holidays; during the working days they were to receive 2*s.* 6*d.* per day wages, and if they neglected to work on any one day, they were each to forfeit a penalty of 1*s.*; they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work, and as soon as that was accomplished, they were to be at liberty to go where they pleased; and though there was a reservation of the jurisdiction of the Justices in case of any disputes: Held, that this was an exceptive contract, and that a workman who had served under it for one whole year did not thereby gain a settlement.

Two Justices removed *Isaac Ward*, from ——— to *Gateshead*. The Sessions, on appeal, confirmed the order, and stated the following case for the opinion of this Court:—

By a memorandum of agreement, bearing date 5th *April*, 1813, made between *J. D.* of the one part, and several persons therein named (of whom the pauper was one,) of the other part, it was stipulated and agreed that the said persons should work in a certain colliery therein mentioned for one year, ending 5th *April*, 1814, on the terms and conditions, and subject to the penalties and forfeitures after mentioned. First, that the labourers should work for the whole year, except during ten days in the *Christmas* holidays, when they were not to work, nor to be liable to any penalties for not working. Second, that during the working days in the year, they were to receive each 2*s.* 6*d.* per diem, and in default of doing any work in any one of those days, they were to forfeit and pay 1*s.* each, as a penalty for their negligence; and third, they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work, and as soon as that was accomplished, they were to be at liberty to go where they pleased. Under this agreement the pauper served a year, and the question was, whether by such service he gained a settlement in the parish in which the colliery was situated.

*J. Williams*, for the defendants, contended, that the exceptions, reservations, and penalties in the contract, vitiated the settlement; and he cited *Rex* v. *Edgmond*, as precisely in point.

*Tindal*, contrà, contended, that the last clause of the agreement which provided, "that nothing herein contained shall alter, bind, or affect the legal remedies which usually belong to masters and servants, or in any respect have relation to the jurisdiction of magistrates in cases of disputes between them," must be taken in connexion with the previous agreement, to work absolutely for a whole year, and if so, the pauper would have gained a settlement by serving under it.

Abbott, C. J.—I am of opinion that the pauper did not gain a settlement under this agreement. It is an exceptive contract, which completely negatives the idea of a yearly hiring and service. The last clause of the agreement cannot control its previous stipulations, and indeed there is no connexion between the last and the preceding clauses. The mode of punishment for any breach of contract is stipu-

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he insisted were cases of exceptive contracts, as the very terms of them expressly imported. Here there was no express exception. There is no limitation as to any number of hours during which the pauper should work each day. To construe this an exceptive contract, the exception must appear on the face of the instrument itself. If by the custom of trade, or the ordinary manner in which servants are employed, the servant is required only to work certain hours in the day, that would not constitute an ex-

lated for between the parties themselves, and supersedes the control which the magistrates in other cases would have over hired servants. Under this agreement, the magistrates could not punish the pauper for leaving the service, which event is contemplated by the parties, who agree, that for any default, the servant shall pay certain fines or penalties for neglecting his work. I think this case cannot be distinguished from *Rex* v. *Edgmond*. There, the pauper, in consideration of weekly wages, agreed to serve a bricklayer for three years, but in case he should neglect his master's business, or lose any time on his own account in any one week during the first year, then, that his master should deduct, from his weekly wages, in proportion to any over-work, which the pauper might do in any one week. There were similar stipulations for the second and third years of the term; and it was also agreed, that in case they could not work through severity of weather, in any one year in the winter time, then, that the master should pay no wages during that time, but should permit the pauper to employ himself in any other business. The Court held, that these were express exceptions in the contract, and that the pauper did not gain a settlement by serving for a year under it. That case is directly in point with the present. It is manifest, that here the pauper is not to be under the control of the master for the whole of every day.

Bayley, J.—The pauper in this case, for any thing that appears, might have worked for any other master during the year; for if by extraordinary strength and skill, he did a quantity of work, which should be equal to a day's work, he was at liberty afterwards to do what he pleased. In addition to *Rex* v. *Edgmond*, *Rex* v. *North Nibley* is also in point, where the stipulation was, that the pauper should work twelve hours each day for five years, as a weekly servant; and that was held to be an exception which destroyed the settlement.

Best, J. (a).—The stipulation in this case, is, to do a certain quantity of work during each day, and as soon as the work is performed, the control of the master ceases.

Order of Sessions confirmed.

(a) *Holroyd*, J. was absent.

ception (*a*). In almost every contract there must be some exceptions implied; as for instance, suppose a clerk employed in a merchant's counting-house at a yearly salary, the hours of rest would not render it an exceptive contract. In the present case, it was quite obvious, that the stipulation as to the number of hours during which the pauper was to work, was merely introduced as a mode of calculating the wages. The hiring was general, but the mode in which the wages were to be paid, and the work performed, was special. The stipulations introduced could not control the original unqualified hiring for a year. It was clear that the pauper could not have left his master's service, and the special provision saving the ordinary jurisdiction of the Justices was quite decisive to negative this as an exceptive hiring.

*Tindal*, contrà, contended, that this was an exceptive contract, plainly manifested by the stipulation as to the quantity of labour which was to constitute a day's work. Suppose the pauper, as soon as he had performed fourteen hours labour, refused to do any more, could he be compelled, by the interposition of a magistrate, to work any longer? If not, then there was an exception in the contract which destroyed the notion of a conditional hiring, and no settlement could be gained. The principle on which *Rex* v. *Edgmond* was decided, must govern this case. An original hiring for a year, will not over-ride the subsequent exceptions. In *Rex* v. *Edgmond* there never was an original hiring for a year, and yet the stipulation in that case for absence from work during frost, was held to render it an exceptive contract, and defeat the settlement. That stipulation is similar to the provision here, respecting the repairs of the machinery for working the colliery. But *Rex* v. *Gateshead* is a decisive authority against the settlement. In that, the stipulations were nearly similar to those in the present case, and the Court held, that *Rex* v. *Edg-*

(*a*) Vide Burr. S. C. 671. 1 Dougl. 333. 1 Barn. & Ald. 322.

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*mond* was not distinguishable from it. If those two cases were properly decided, they must govern this, and consequently the order of Sessions must be quashed. He also relied on *Rex* v. *North Nibley* (a).

The Court took time to consider of the case, and judgment was now delivered by

Bayley, J.—The only question in this case is, whether the hiring was conditional or exceptive. Many cases of a nature similar to the present, are to be found in the books, and the distinction between them is certainly subtle, and at first sight not easily discernible. But, adverting to them in an aggregate view, the real distinction seems to be this; where the bargain is originally made for an entire year, and terms are introduced indicating a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be in the power of either party to suspend or terminate the service for a part of the year; still, if the service is in fact performed during the whole year, and neither party avails himself of the condition, a settlement is gained. For this purpose, a conditional hiring is the same as an absolute hiring, if the condition is not acted upon. But where by the terms of the bargain, the relation of master and servant will not subsist during a whole year, without some further arrangement being made between the parties, the hiring is exceptive, and therefore where the agreement is to exclude days or hours from the service, that is an exceptive hiring. It was contended, in argument, that both days and hours were excluded from the service in this case, by the terms of the agreement, but we are of a different opinion. The pauper was hired by indenture, and the agreement was, that the master should pay 1*s.* 10*d.* for every good day's work not exceeding fourteen hours, and 2*d.* per day more when that time was exceeded. It was argued, that by that

(a) 5 T. R. 21.

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agreement, the pauper was at liberty to absent himself from work at the termination of the fourteen hours, and that the master could not compel him to work beyond that limited period. But we are of opinion that the period of work was mentioned only as the measure of wages, that the contract does not impose any limit upon the work, which ought to be reasonably exacted by the master; and that the relation of master and servant continued throughout the whole twenty-four hours. With respect to the forfeitures, we are also of opinion that the pauper was not at liberty upon the payment of them, to withdraw himself from his work as he thought proper, bnt that they were mentioned merely with the view of compelling uninterrupted attendance; and this view of the case is strongly corroborated by the subsequent stipulation, that nothing expressed in the indenture should be so construed as to abridge the ordinary jurisdiction of the magistrates. The clause relating to the repair of the machinery has also been relied upon in favor of the appellants, and undoubtedly if that can be considered as an exception, this was a contract, not for an entire year, but for a year, minus seven days. We are, however, of opinion, that it cannot be so considered, but that this was a contract for a year, with power to the master to stop the work, if he should think right to do so. If he had done so, the question for our consideration would have been different, but that fact is not found by the case, and therefore this was a bargain for a year, with liberty to suspend the service, and was consequently a conditional, not an exceptive hiring. The distinction between a condition and an exception will be found consistent with all the decisions upon this subject. Wherever it has been held that a servant having liberty to absent himself is not entitled to a settlement, it will be found, either that he had in fact taken advantage of that liberty, or that the time was by necessity excepted out of the original contract. But neither of those alternatives is found here; this therefore is a conditional hiring, and as the condition has not been acted

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upon, the pauper has gained a settlement in *Byker*. The order of Sessions consequently was correct, and must be confirmed.

Order confirmed (*a*).

(*a*) Vide 2 Bott. 211. 217. Burr. S. C. 280. 458. 753. 1 Dougl. 391. 1 East, 599. 1 B. & A. 322. 2 Id. 520. 1 M. & S. 622. 3 Id. 299.

## The KING *v.* The INHABITANTS of BAWBURGH.

Where a parish apprentice was bound by two Justices, and the order was referred to in the indentures, but not by the *date* thereof: Held, that the indentures were void by 56 G. 3. c. 139. ss. 1 & 5, and conferred no settlement by service under them.

TWO Justices, by order, removed *William Peas* from *St. Andrew's*, in *Norwich*, to *Bawburgh*, in *Norfolk*, and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper is an illegitimate child, born in *Great Melton*, in *Norfolk*. By indenture of apprenticeship, dated 11th *May*, 1819, he was bound apprentice to *Henry Sapy*, a bricklayer, at *Bawburgh*, for seven years. The indenture was executed by the churchwardens and overseers of *Great Melton*, by *Sapy*, and by the pauper, attested by the clerk of the magistrates; and beneath the signatures of those parties was a consent by two magistrates to the binding, but the signatures of the latter were not attested, nor did it appear whether they were affixed before, or after, the execution of the indenture by the other parties. The magistrates' order for the binding was regular, and was referred to in the indenture, but not by the date thereof. The indenture bore no stamp. Ten pounds were paid by the parish officers of *Great Melton*, to *Sapy*, as a premium for the binding. The pauper resided with *Sapy*, and served him under the apprenticeship for upwards of a twelvemonth, when *Sapy* failed, and the pauper, with his consent, left him, and worked and lodged with another master, at *Bawburgh*, for more than forty days, and finally became chargeable to that parish. The question for the opinion of the Court is, whe-

ther the indenture of apprenticeship was a valid one, by the statute 56 *Geo.* 3. c. 139, and as such conferred a settlement by indenture and service under it.

*Marryatt*, in support of the order of Sessions. The first objection is, that the indenture does not specify the date of the magistrates' order of apprenticeship. Now, section 1 of 56 *Geo.* 3. c. 139, does not require that the indenture shall set out the date of the magistrates' order in full, it is only *to be referred to*; and therefore the omission of the date will not afford a ground for defeating the settlement, and will not necessarily avoid the indenture, although the 5th section requires it to be signed, "as hereinbefore directed." There is no previous direction that it shall be signed when the order is dated, setting out that date, and as the word "hereinbefore" restrains the mode of signature to the previous enactments, and yet cannot be rejected, although there are no such previous enactments, this omission cannot be held to avoid the instrument. This principle has been expressly laid down with reference to leases, *Doe* v. *Godwin* (a), and there is no reason why it should not equally apply to the instrument in this case. The Court will presume, that the magistrates have strictly discharged their duty, unless the contrary is shewn; and the contrary is not shewn here. He was proceeding to the other points intended to be raised in the case, when

The Court interposed, and, without hearing *Robinson*, contrà, proceeded to give judgment.

Bayley, J.—It is not necessary to hear any further argument, because it is quite clear by the first and fifth sections of the statute, that the indenture is void, for not setting out the date of the magistrates' order of apprenticeship. With reference to this point, the first section provides, that "such order shall be referred to by the date

(a) 4 M. & S. 265.

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thereof, and the names of the said Justices in the indenture of apprenticeship." With this requisite, the indenture does not comply, and therefore it is in this respect clearly voidable. The fifth section goes on to declare, that "no settlement shall be gained by reason of such apprenticeship, unless *such* order shall be made, and such allowances of *such* indenture shall be signed, as hereinbefore directed." The word "such," as here introduced, is by no means an immaterial word, but evidently implies, that no indenture shall be valid to confer a settlement, except such an one in all respects as the preceding section has described. This is not such an indenture, and therefore by the very expressions of the statute it is necessarily and absolutely void. Upon this single point, therefore, without reference to the other objections, I am of opinion, that no settlement has been gained by service under this indenture, and consequently the order of removal, and the subsequent order of Sessions must be quashed.

BEST, J., concurred (*a*).

Orders quashed.

(*a*) *Holroyd*, J., was absent at the Old Bailey.

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The KING *v.* The INHABITANTS of LAMBETH.

Where an appeal was entered at the *Easter*, and respited until the *Midsummer* Sessions, and on the 24th *June* a copy of the order of respite was served on the respondents, without any notice of trial, and the respondents appeared at the following Sessions in *July*:—Held, that the Sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite.

THE order of removal in this case was dated on the of *April*; on the first day of the ensuing Sessions, which was the 15th of *April*, the appellants entered and respited their appeal, and the order of respite was dated on that day. On the 24h *June*, a copy of the order of respite was served upon the respondents, but no notice of trying the appeal was given. The appeal stood in the paper for trial at the next

Sessions, in *July*, at which both parties appeared, but the respondents declined going into their case, objecting, that as no notice of trial had been given, they were not bound to appear and try, and the appeal, in point of practice, could not be heard; they contended that there was, in fact, no appeal before the Court, and claimed to have the order of removal confirmed. The Justices being of opinion, that the objection was well founded, confirmed the order, subject to the opinion of the Court upon the point of practice.

*G. Cross*, in support of the order of Sessions. The respondents having received no notice whatever of appeal, were not bound to appear and support the order of removal, and consequently there was in fact no appeal, and the Sessions had no alternative but to confirm the Justice's order. The appellants entered and respited the appeal at the first Sessions under the authority of the statute 9 *Geo.* 1. c. 7. s. 8., and the service of the order of respite, was merely a part of that proceeding, and did not at all obviate the necessity of giving a reasonable notice of the appeal itself, and their intention to try at the next Sessions. The notice of appeal was necessary long before that statute was passed, and the want of it has been held to be good ground for the Sessions to dismiss the appeal, *Rex* v. *Stroud* (*a*), and *Rex* v. *Bucks* (*b*), in which latter case, *Lawrence*, J., commenting upon that statute, declares, that it leaves the necessity of the notice of appeal precisely the same as it was before that statute had passed. [*Best*, J. Was not the order of respite in effect a notice of appeal, as in this Court an order of Nisi Prius, making a cause a remanet, supersedes the necessity of a fresh notice of trial? (*c*)] In this case there never was any notice of appeal at all, for the order of respite cannot be considered as a notice that the appellants mean to try. This mode of proceeding was

(*a*) 1 Str. 315.

(*b*) 3 East, 342.

(*c*) *Shepherd* v. *Butler*, ante, vol. i. p. 15.

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likely to be prejudicial to the respondents, because, if they had accepted this notice as a sufficient notice of trial, and had appeared to try, and the appellants had absented themselves, the respondents could not have been allowed their costs; for the 8 & 9 *Wil.* 3. c. 30. s. 3. empowers the Sessions to award costs only, upon proof made before them of a notice of appeal having been given, which the respondents certainly would not have been in a situation to prove. [*Bayley*, J. Then, as the respondents did not appear at the Sessions, either for the purpose of trying the appeal, or of applying for their costs, (and the last argument would assume, that they did appear for neither of those purposes,) why did they appear at all?] The respondents appeared in order to enquire in what stage the appeal really was, for of that they were necessarily ignorant. [*Bayley*, J. The respondents did appear, which they would not have done had they not received the order of respite; and therefore it is clear that they treated that order as a valid notice of trial. Then ought they afterwards to turn round and treat it as a nullity?] It was in fact, and according to the rules of Sessions practise, a nullity; it is perfectly new to consider an order of respite as equivalent to a notice of trial. It never has been so considered; therefore the respondents have had no notice of trial, and the Sessions being on that ground authorized to dismiss the appeal, their order must be confirmed.

*Marett*, contrà, was stopped by the Court.

Bayley, J.—I am quite satisfied, that the service of the order of respite, served, as it was, more than two months after the date of the order itself, was a good substantial notice of trial for the next Sessions. The respondents could not possibly understand it in any other light, nor could the appellants have served it for any other purpose. The appeal, therefore, has been improperly dis-

missed, and justice requires that it should go down to the Sessions to be heard upon the merits.

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Best, J. (a) concurred.

Order of Sessions quashed.

(a) *Holroyd*, J. was absent.

## The King *v.* The Inhabitants of St. Pancras, in Middlesex.

The 35 *Geo.* 3. c. 101. s. 4. does not prevent a person from acquiring a settlement by paying public parochial taxes in respect of a tenement *above* the yearly value of 10*l.*; although there is no residence for a whole year, as required by 59 *Geo.* 3. c. 50.

By an order of two Justices, *Kitty*, the wife of *William Buchan*, was removed from *Lambeth*, in the county of *Surrey*, to *St. Pancras*, in the county of *Middlesex*, as the place of her last settlement. The Sessions, on appeal, confirmed the order, subject the opinion of this Court, on the following case:—

The husband of the pauper occupied a house in *Thornhaugh Street*, in the parish of *St. Pancras*, and resided in the same for a period not exceeding nine months, and subsequently to the 2d day of *July*, 1819, at the yearly rent and value of 80*l.*; and during such occupation, was regularly rated by, and paid a poor rate to, the parish of *St. Pancras*, as such occupier of the said house. The question for the opinion of the Court is, whether the pauper's husband gained a settlement in the parish of *St. Pancras*, by being so rated at, and paying his share towards, the public taxes and levies of the said parish, under the 3 & 4 *W.* & *M.* c. 11. s. 6, and 35 *Geo.* 3. c. 101. s. 4.

*Cowley*, in support of the order of Sessions. The question is, whether the 3 & 4 *W.* & *M.* c. 11. is or is not absolutely repealed by 35 *Geo.* 3. c. 101. If it be not, then it is clear that in this case the pauper gained a settlement under the circumstances above mentioned. By s. 6. of

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3 & 4 *W.* & *M.* it is enacted, "That any person coming to inhabit in any parish charged with and paying his share towards the public taxes of the said parish, shall gain a settlement." Standing alone, it is quite clear, that under this section a settlement might be gained by paying rates or taxes in respect of a tenement of any value whatever. What then is the effect of 35 *Geo.* 3. c. 101? No more than, to limit the operation of the previous act as to the value of the tenement. By section 4. it is enacted, "That no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the said parish, for, or on account, or in respect of any tenement, *not being of the value of* 10*l.*" It is quite obvious that the operation of this latter statute is not to repeal the former, but merely to limit it to tenements which are of the value of 10*l.* and upwards. A settlement therefore may still be gained by the payment of rates in respect of tenements. Undoubtedly in *Rex* v. *Islington* (*a*), Lord *Kenyon* said, that the legislature in passing the 35 *Geo.* 3. intended to make an end of this head of settlement in future; but that was an obiter dictum. It is true also that in *Rex* v. *Penryn* (*b*), Lord *Ellenborough* expressed himself to the same effect; but *Abbott*, J. in that case seemed to be of opinion that the operation of the statute was merely to prevent the acquisition of settlements by "paying rates for tenements of very small value." In *Rex* v. *Cheshunt* (*c*), it was decided, that a person residing on a tenement of more than 10*l.* annual value, could not gain a settlement, except by paying rates. There, however, the pauper was a servant of the crown, and resided on a tenement belonging to the public, and consequently could not gain a settlement by such residence. There being nothing in the 35 *Geo.* 3. which expressly takes away the settlement by paying rates or taxes, the decision of the Sessions was right. The statute 59 *Geo.* 3. c. 101. has no reference whatever to this question, because that act is confined solely to settlements by renting tenements.

(*a*) 1 East, 283. (*b*) 5 M. & S. 443. (*c*) 1 B. & A. 473.

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*Barnewall*, contrà, contended, that the operation of 35 *Geo.* 3. c. 101. was altogether to do away with the head of settlement by the payment of rates and taxes. Prior to that statute the settlement by payment of rates and taxes was never had recourse to unless the pauper rented a tenement of less than 10*l.* annual value; therefore, when it was enacted, that no settlement could be gained by paying rates or taxes for such a tenement, it was obvious that the legislature intended to put an end to that head of settlement. This was the opinion of Lord *Kenyon* in *Rex* v. *Islington*, and of Lord *Ellenborough* in *Rex* v. *Penryn*. It was observable, that Mr. *East*, the reputed author of this statute, in his report of the first-mentioned case, added a note to the text, without intimating any disapprobation of what was stated by the Chief Justice. Indeed, Lord *Ellenborough* in the latter case, expressed a decided opinion upon the subject. His Lordship said, "This enactment was undoubtedly meant to abrogate this head of settlement, and the authorities upon it, which, perhaps, had been carried to some degree of absurdity. Lord *Kenyon* appears to have considered the operation of the act; and I am glad that we have his authority for it. If this construction of Lord *Kenyon* had not been felt to be the correct one, I doubt not that we should have had some observation upon it from the learned Reporter, with whom the act originated, and which is generally known by his name." The 59 *Geo.* 3. so far from being beside the present question, afforded a very strong argument in favour of the construction now relied on, for although that statute appeared from the preamble to be confined to settlements gained by the renting of tenements, yet it enacted, "That no person shall acquire a settlement by or by reason of dwelling for forty days in any tenement, unless it be held for the term of one whole year, and the rent paid for a year, &c." If, therefore, a settlement might be gained in every case by paying the smallest amount of rates, although the tenement might not be held for a year, and although no rent was paid, a pauper might

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be said to gain a settlement by reason of dwelling on a tenement, and this statute would be repealed by implication.

The Court took time to consider the case, and

*Bayley*, J. now delivered judgment. The question raised in argument in this case was, whether the right to gain a settlement, by being rated and paying taxes, was still subsisting at the time the pauper's husband was rated and paid; the tenement which he occupied being of the yearly value of 10*l.* or upwards. It is clear that the husband could not gain a settlement by renting the tenement, because he had not been in the occupation of it during the period of one whole year, as required by the statute 59 *Geo.* 3. c. 50. For the purpose of deciding the question, we must advert to the language of 35 *Geo.* 3. c. 101. s. 4. by which it is enacted, "That no person or persons whatsoever, who shall come into any parish, township, or place, shall gain a settlement in such parish, township, or place, by being charged with and paying his, her, or their share towards the public taxes of the said parish, township, or place, for, and on account, or in respect of any tenement or tenements, not being of the yearly value of 10*l.*;" and it was argued, that this head of settlement was entirely destroyed by that section. We must consider what was the state of the law upon this subject before the 35 *Geo.* 3. passed. As the law then stood, a person rated and paying taxes for a tenement, whatever might be its value, thereby acquired a settlement. In such case the parish was considered as having adopted him as one of their parishioners. In most instances, where the tenement was of the annual value of 10*l.*, the occupier would gain a settlement on other grounds. During the argument, however, one instance was referred to, in which a party occupying such a tenement would not acquire a settlement, unless on the ground of paying rates. That was the case of *Rex* v. *Cheshunt*, where the pauper was living in a house belonging to the king, as a servant of the public. It is to

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be observed, that the words of the section to which I have referred, do not in terms import an intention on the part of the legislature to abolish this head of settlement altogether. They are clearly qualified, and apply in direct terms to tenements *not being of the yearly value of* 10*l*. Before we give a general effect to words which are not in themselves general, we ought to see clearly that such was the intention of the legislature. We think it would be going too far to give a general effect to the words of this act, when we find that "being rated and paying," as applied to a tenement of above the value of 10*l*., was one medium by which a settlement in all cases might be obtained, and in some instances the only medium. The cases of *Rex* v. *Islington* and *Rex* v. *Penryn*, referred to in argument, are certainly at variance with the opinion of the Court as at present constituted. In the former case the point did not properly arise, and the opinion of Lord *Kenyon* was quite extra-judicial. The only question in that case was, whether the operation of 35 *Geo*. 3. c. 101. s. 4. was limited to persons who should thereafter come into any parish, or whether it extended to persons residing there before. That question was again brought under the consideration of the Court in *Rex* v. *Penryn*, when Lord *Ellenborough* certainly gave a decisive opinion that it was the intention of the legislature entirely to abolish this head of settlement. On that occasion, the present Lord Chief Justice is reported merely to have said, that it was expedient to do away settlements by paying rates for tenements of very small value. From the report of that case, it does not appear whether my Brother *Holroyd* or myself were present. These two authorities naturally drew the attention of the Court to consider carefully the words of 35 *Geo*. 3, and the state of the law as it existed before the passing of that act. Had no case occurred before that time, in which the occupier of a tenement of 10*l*. yearly value would gain a settlement by the payment of rates, and on that ground alone, then probably the words of the statute might be construed to have a general operation, and to

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destroy this head of settlement entirely; but one instance has been mentioned, and possibly there may be others, where, before the 35 *Geo.* 3. a settlement could not be gained by the occupier of such a tenement, unless by the payment of rates. Under such circumstances we think we are not warranted in saying that these qualified words were intended by the legislature to have a general and unqualified operation, so as to annihilate entirely this head of settlement. Possibly it might have been supposed at the time when 59 *Geo.* 3. was passed, that this head of settlement no longer existed; and we have given our opinion as early as we conveniently could, in order, that if such idea existed, the error may be amended during the present Sessions of Parliament.

Order of Sessions confirmed.



The King *v.* The Inhabitants of St. Faith's, Newton.

Where a married woman, upon the death of her husband, assumed her maiden name, and after the lapse of several years was married, by banns, to a second husband in that name, with the description of "widow:"—Held, that in the absence of fraud, such marriage was legal, and that her settlement followed that of the second husband.

TWO Justices removed *Ann Lovick* and her son from *St. Margaret's, Norwich,* to *St. Faith's, Newton,* and on appeal by the latter, the Sessions confirmed the order, subject to the opinion of the Court, upon the following case:—

The pauper, whose maiden name was *Ann Lovick,* was married on the 14th *September,* 1812, in the parish of *St. Helen, Norwich,* to one *James Browne,* a man of colour, whose settlement is unknown, and who was then a private soldier in the 69th regiment of foot. About half-a-year afterwards, *Browne* went to *Ipswich,* and the pauper, at his request, followed him thither, and remained with him there a few weeks, when she returned to *Norwich,* and never saw or heard any thing of her husband afterwards, except that a report reached her of his death by drowning, but it is not otherwise known when he died, or whether he is dead. On the 31st *March,* 1822, and after the pauper had received

such information of the death of *Browne*, she was married by banns, in the parish of *St. Michael, Coslany, Norwich*, to *William Rigg*, widower, by the name and description of *Ann Lovick*, widow. Both at *Ipswich*, and after her return to *Norwich*, the pauper went by the name of *Ann Lovick* only till her marriage with *Rigg*. The settlement of *Rigg* was proved to be in a third parish in *Norwich*. If the Court should be of opinion that the second marriage was legal, then the order of removal and the order of Sessions are to be quashed; if otherwise, to be confirmed.

*H. Cooper*, in support of the order of Sessions. The Court will act on the positive authority of *Rex* v. *Twining* (*a*), and will presume the death of the first husband, rather than the commission of the crime of bigamy by the wife; and therefore it is unnecessary to discuss that point. The only question is, whether the second marriage was legal, and under all the circumstances of this case, the Court will be of opinion in the negative. This case is distinguishable from *Rex* v. *Billingshurst* (*b*), because there no other name but that by which the party was married, had ever been used by him, but here the name of the first husband was used by the pauper for some time. [*Bayley*, J. But the case of *Rex* v. *Burton-upon-Trent* (*c*), is free from that distinction; there the pauper was never known except by the assumed name under which he was married, and yet the marriage was held legal. Is not that case decisive of the present?] That case was decided upon the principle, that the name was not assumed for the purpose of fraud; but that is not the question here, nor ought the question of the validity of a marriage to be confined to so narrow a scope. It is a question of public policy, involving the public interest, and should be so considered. [*Best*, J.—In point of fact, was not *Lovick* the pauper's real name? Had she not acquired it, and made it her own by long use? The late case of *Doe* v. *Yates* (*d*) has decided, that the assump-

(*a*) 2 B. & A. 386.
(*b*) 3 M. & S. 250.
(*c*) 3 M. & S. 537.
(*d*) Ante, vol. i. p. 187.

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tion and long use of a name is sufficient to satisfy the words "bearing a name" under a devise, without taking it by an act of Parliament.] The pauper here, had by her first marriage, acquired another legal name, and she had no authority to lay that aside and resume her maiden name. Great mischief would attend the exercise of such an authority, for it would utterly annihilate that notoriety of the parties about to be married, which the Legislature thought so essential. [*Best*, J.—According to that reasoning, every man who has changed his name by licence, ought to be married under an alias.] The pauper was not married by her true name, for her husband's name was her's, and she had no title to any other. It is said by Sir *William Scott*, in *Frankland* v. *Nicholson* (*a*), "the statute requires the true christian and surname, and unless there be a publication to that effect, it cannot be qualified; the marriage must be pronounced null and void." Now here there was not a publication of the true surname, and therefore the marriage is void. [*Bayley*, J. In that case there was no evidence that the woman had ever been generally known by the assumed name; and that makes a wide distinction between the two cases.] The question in cases of this nature is, not whether the public, or any individual, *has in fact* been misled, but whether it is possible that any one *may be* misled, by the concealment of the real name. Now here, persons certainly might have been misled. At all events the pauper was not truly described when she was called "*Ann Lovick*, widow;" for if she was a widow she was *Ann Browne*. In point of fact, therefore, the real name of the pauper was not published and used at her second marriage, and consequently, both according to the spirit and the letter of the law, that marriage is null and void.

*Robinson*, contrà, was stopped by the Court.

Bayley, J.—The object of the statute was to make it notorious to the world who the parties were that were about

(*a*) 3 M. & S. 259, note 1.

to enter into the married state, and therefore wherever the name is fraudulently assumed or concealed, that object is defeated, and the marriage is void. But when the party has assumed a new name, not for any fraudulent purpose, but fairly and openly, and has for a considerable period used and been known by that name, then, it has been in several cases decided, a marriage under that name is valid. The name in this case does not appear to have been assumed for the purposes of the marriage, or for any improper purpose; and under the circumstances of this case, at least as much notoriety was given of the person of the pauper by the name of *Lovick*, as could have been given by that of *Browne*. The former was her maiden name, she had gone by it for many years, and was therefore more likely to be recognized by that name than by the other. The mere fact that some one individual *may* be deceived, is not sufficient to annul the marriage; the name must be assumed fraudulently. That has long been the rule of construction upon this subject, and that rule is acted upon in the cases that have been cited. I am therefore of opinion that this is a valid marriage, and that a different decision would be very likely to produce much mischief; for where a party has several names, one of them may easily be omitted by accident or mistake, and it would be a most grievous thing, if every marriage solemnized under such circumstances was to be deemed illegal.

Best, J. (*a*).—I should pause long before I brought my mind to give a judgment that at all tended to overturn the decision of a Judge for whom I entertain so high a respect as my Lord *Stowell*; but I am quite convinced, that in substantiating this marriage, we are acting upon the very principle which he so ably laid down in the case of *Frankland* v. *Nicholson*. The pauper here had acquired the name of *Lovick* by long use and general reputation, and it seems evident to me, that the fact of the marriage would have been

(*a*) *Holroyd*, J. was absent at the Old Bailey.

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far less notorious had the banns been published under the name of *Browne*, than it was by a publication of them under that of *Lovick*. It has been asserted in the argument, that a married woman cannot legally bear any other name than that which she has acquired in wedlock; but the fact is not so; a married woman may legally bear a different name from her husband, and very many living instances might be quoted in proof of the fact. Besides, the pauper in this case, was in the eye of the law a feme sole; she might adopt any name she thought proper, and seven years use of any adopted name would by law identify that name as her own. This woman had borne the name of *Lovick* during a space of ten years, and nothing was so natural, or so well calculated to render the fact of her marriage notorious, as her publishing the banns in that name. I fully agree, therefore, that this was a valid marriage.

Order of Sessions quashed (*a*).

(*a*) See *Mather* v. *Neigh*, in the Consistory Court, *Trin.* 47 *Geo.* 3, and 1 Nolan's P. L. 267.

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## The King *v.* The Inhabitants of Yalding.

Where the court-leet of the manor of *A.* appointed a person to be street-driver of the borough of *R.*, a district within the manor, extending into seven parishes, in one of which he afterwards became chargeable as a pauper, and it appearing, first, that it was not an annual office; second, that he took no oath of office; and third, that he had not served under the appointment for one whole year:—Held, that he had not such a public annual office or charge as would gain him a settlement under 3 *W.* & *M.* c. 11. s. 36.

By an order of two Justices, *John Russell*, *Ann* his wife, and their seven children, were removed from the parish of *Yalding* to the parish of *Marden*, both in the county of *Kent*; and on appeal the Sessions quashed the order, subject to the opinion of the Court, on the following case:—

At the hearing of the appeal, it was admitted, that the pauper had gained a settlement about twenty-nine years since, in the appellant parish, by yearly hiring and service. The manor of *Aylesford* is a manor of the ancient demesne of the Crown, the court-rolls of which have been regularly

kept for a long series of years, and the borough of *Rugmorhill* is a district within the said manor, extending into seven parishes, and some part of it lying within the parish of *Yalding*. At a court-leet holden for the manor of *Aylesford*, it has been usual from time immemorial to appoint certain officers, namely, constables and borseholders, such officers being always expressed to be appointed to serve "for the year ensuing," and sworn to discharge the duties of their office. A custom of appointing an ale-conner at the court-leet, has also existed in the manor from time immemorial, but it does not appear that that officer was ever sworn to execute his office. Since the year 1793, the office of weigher of weights and measures has been added to that of ale-conner. These latter, as well as the street-driver hereafter mentioned, have been appointed from time to time at the same court-leet as the constables and borseholders, although not expressed to be "for the year ensuing." At a court-leet holden in 1750, a street-driver of the borough of *Rugmorhill* was appointed for the first time. Similar appointments took place in 1753, 1764, 1772, and 1784, and from that time to the present, thirty-eight courts-leet have been held, at each of which a street-driver has been appointed, with the exception of the year 1798, no court having been held in that year. But in the year 1799, two court-leets were held, one in *January* and one in *November*, at which the appointments were in the same form as in other instances, so that such officer, together with the constables, borseholders, &c. has been appointed on the days of holding the court-leet, which have occurred at intervals, sometimes of more, and sometimes of less, than a year; but it does not appear that he was ever sworn to discharge the duties of his office, or that there is any oath applicable to the office. In the record of the proceedings of a court-leet holden for the manor of *Aylesford*, on the 19th of *January*, 1813, is the following entry, among several others, of a presentment of the Jury:—" Also they present and appoint *John Russell* to be street-driver of and within the

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borough of *Rugmorhill*, within the said manor." On the 8th of *January*, 1814, the pauper was again appointed in a similar form, and a third time on the 20th of *February*, 1815. The pauper never appeared at the courts at which he was nominated, and was never sworn. He discharged the duties of the office in person from the 19th of *January*, 1813, up to his re-appointment on the 8th of *January*, 1814; he also served in person for a short period after his re-appointment in 1814, but another person, to whom he paid no compensation, served, at his request, in his stead, during the remainder of 1814, and after his appointment in 1815; including, however, his services under the first and second appointments, he served the office in person for more than a whole year. During the years 1813, 1814, and 1815, he resided in the respondent parish, but not in that part of it which is situate within the borough of *Rugmorhill*, where his duties were to be executed. No part of his residence was under a certificate. The question for the opinion of the Court is, whether, under these circumstances, the pauper gained a settlement in the parish of *Yalding*.

*D. Pollock*, in support of the order of Sessions. There are three objections raised to the sufficiency of the settlement claimed by the pauper in this case; first, that the situation filled by him is not a public office within the meaning of the statute 3 *W.* & *M.* c. 11. s. 6; second, that he was never legally placed in the office, inasmuch as he was not duly sworn in upon his appointment; and third, that he did not personally serve the office during a whole year, nor on account of the whole parish. With respect to the last point, the case of *St. Thomas, Winchester* v. *St. Mary, Winchester* (a), is decisive to shew that the service in this instance is sufficient. [*Bayley*, J.—There the pauper executed the office throughout the whole of the parish in which he resided, and therefore it was fairly to be presumed that it was notorious to every inhabitant of the parish, that he

(a) Burr. S. C. 27.

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did in fact hold the office.] There are many other cases which shew, that the duties of the office need not extend over the whole of the parish in which the pauper resides. [*Bayley*, J.—Is there any case in which it has been held that the serving an office in one part of the parish, and residence in another, affords sufficient notoriety, and is a sufficient service to confer a settlement?] Perhaps no case is to be found, that expressly goes that length; but upon the general principle of the rule, and by analogy to other cases, it would seem that residence in any part of the parish is sufficient. [*Bayley*, J.—That will hardly be enough to support this settlement; but independently of that point, can this situation be called an "office" within the meaning of the statute?] A variety of cases have been decided upon that subject, but no strict or definite rule has ever yet been laid down. The words of the statute are "office or charge;" and at least the pauper's employment in this case seems to satisfy the meaning of the latter term.

*Berens*, contrà, was stopped by the Court.

Bayley, J.—It is unnecessary to go more at large into the objections raised upon the face of this case, because it is perfectly clear that the office held by this pauper, is not a public annual office or charge within the meaning of the statute. This person was appointed at one court-leet to serve till the next; the interval between the two courts did not amount to a year, and the courts were held at various intervals, ad libitum. Therefore he was neither appointed for a year, nor did he serve a year; the office was neither in its nature annual, nor was the appointment to it annual; and one or the other of those characteristics is absolutely necessary. I entertain very considerable doubt whether his residence was such as to afford due notoriety of his being the person who held the office, and also whether, not being sworn, he was legally invested with the office; but it is not necessary to decide those points, because the settlement is

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evidently insufficient upon the ground already noticed. This is not a public annual office in its nature, and the pauper was not appointed to it for a year; and therefore it is not such an office as is necessary to confer a settlement.

Best, J. (a).—Upon the point last alluded to by my Brother *Bayley*, it is quite clear, that no settlement has been gained in this case. There must be either an appointment to an office to serve for a year, or an appointment to an office which by its nature is annual; and here there is neither the one nor the other. I am also inclined to think that the pauper's residence was insufficient. The principle upon which the Courts have been accustomed to decide what is or is not good residence, is, that there shall be such a residence as necessarily renders it notorious to all the parish that the officer is within it. Now here there is no such notoriety, nor from the very nature of the residence, can be. This case also comes within the very distinction laid down by Lord *Kenyon* in the case of *Rex* v. *Whittlesea* (b), namely, that an appointment by the parish at large is good, but that by individuals is not; because this pauper was clearly appointed by a portion of the parishioners only.

Order of Sessions quashed.

(a) *Holroyd*, J. was absent, at the Old Bailey.
(b) 4 T. R. 807.

## Whitlock *v.* Underwood.

A promissory note, whereby the maker promised to pay "*W.* or bearer the sum of 40*l.* value received, with interest," being in law a note payable *on demand*, requires a five-shilling stamp by 55 *Geo.* 3. c. 184, Sch. Part 1.

Assumpsit by the payee against one of the makers of a joint and several promissory note. Plea, Non Assumpsit, and issue thereon. At the trial before *Park*, J. at the last *Lent* Assizes for *Warwickshire*, the note, being produced,

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appeared to be a note, whereby the defendant promised to pay "Mr. *Whitlock*, or bearer, the sum of 40*l.* value received, with interest." It bore a half-crown stamp only, and it was objected for the defendant, that it required a five-shilling stamp by 55 *Geo.* 3. c. 184, Sched. Part 1, tit. "Promissory Note;" the words of which were, "Promissory note for the payment to the *bearer on demand*, of any sum of money exceeding 30*l.* and not exceeding 50*l.*, five shillings; which said notes may be re-issued, after payment thereof, as often as shall be thought fit." The learned Judge thought the objection well founded, and directed a nonsuit, with liberty to move to enter a verdict for the plaintiff.

*Reader*, in *Easter* Term last, moved accordingly, and obtained a rule nisi, and

*Clarke* now shewed cause. The question turns entirely on the construction to be put upon the schedule of the Stamp Act, there being nothing in the body of the statute which applies to notes of this description. The description in the schedule is, of notes that are re-issuable, and payable on demand, and if this be such a note, it requires the five-shilling stamp. It may, by the terms of the schedule, lawfully be re-issued, and it is not necessary that it shall have been actually re-issued; for the language of the act is "*may*," not "*shall*." It is also payable on demand; the words "on demand," certainly do not appear upon the face of it; but as there is no definite time for payment expressed, it might have been demanded, and would have been payable at any time, and therefore is within the spirit of the statute, and according to general principles of law, payable on demand. The statute does not require that the words "on demand" shall be inserted in the note, but only that it shall be a note so payable; and therefore in both particulars, it falls within the description, and requires the larger stamp.

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*Reader* and *Adams*, contrà. This is not a re-issuable note within the meaning of the statute. The 14th section enacts, that "it shall be lawful for any banker or bankers, or other person or persons who shall have made and issued any promissory notes for the payment to the bearer on demand of any sum," &c. "duly stamped according to the directions of this act, to re-issue the same," &c. Now this note deviates from the description here given, in two particulars, first, it never has been *issued* within the meaning of the act, and therefore cannot be *re-issued*; and secondly, it never could be re-issued, because it is not "duly stamped according to the directions of this act," for that purpose. Then the 24th section provides, that no re-issuable notes shall be issued by any person, "without taking out a licence yearly for that purpose; and every such licence shall specify the name of the person to whom the same shall be granted." Then the 27th section further provides, that every person applying for a licence, "shall produce and leave with the proper officer a specimen of the promissory notes proposed to be issued by him;" and imposes a penalty of 100*l.* upon every person who infringes any one of those provisions. Now these three sections, and the schedule, must be taken together, and when so construed, it is perfectly clear that they apply to banker's notes and no others, to notes which are expressed to be payable on demand, which have been issued, and which were originally made for the purpose of being re-issued, and generally circulated. But this is in no respect such a note. The words "with interest," distinguish it from notes designed for circulation, and render it utterly unfit for such a purpose. Again, the schedule as to bills of exchange shews that this must be the true construction, because it is plain, that if this instrument had, without altering its essential parts, been drawn in the form of a bill, instead of a note, a half-crown stamp would have been sufficient. This circumstance proves that the five-shilling stamp was intended by the legislature to apply to banker's notes only,

for if it was meant to apply to *all* promissory notes, why are all those formalities prescribed as to them, and not as to bills of exchange of similar nature and amount? In the act, the words "on demand" are printed in italics; particular stress is laid upon them, and they are clearly meant to appear upon the face of those notes, which it is the object of the act to reach. The statute being highly penal, must receive a strict and literal construction. If the plaintiff in this case has been properly nonsuited, the defendant becomes liable to a penalty of 50*l.* under the 16th section, for having issued this note in the first instance, without a five-shilling stamp. It is a case of extreme hardship on the plaintiff, who is utterly without remedy, if this question shall be determined against him, and the effect of such a determination will be, that no man can henceforth issue a promissory note of this kind without taking out a licence, which will in fact be a prohibition against issuing them at all; for the act, in express terms, imposes a penalty of 100*l.* upon the first issue.

BAYLEY, J.—The clause imposing the penalty of 100*l.* most clearly applies to the re-issuing of notes only, and not to the mere issue of them in the first instance, and therefore the argument last addressed to us falls to the ground. This is undoubtedly a case of considerable hardship upon the plaintiff, and I should be extremely glad to give my judgment in his favour, if upon a full consideration of this act of Parliament, I could conscientiously do so. But upon a close investigation of the different enactments of this statute, I am compelled to say that this note has not a proper stamp. There is no doubt that for a bill of exchange of the same tenor as this note, a half-crown stamp would be sufficient; but the act makes some distinctions between bills of exchange and promissory notes, and wherever it does so, it at the same time gives a reason for the deviation. The act comprises only two kinds of bills of exchange upon which it imposes a specific stamp, and in those instances

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the amount of the stamp depends altogether upon the period which the bill has to run. With respect to notes, it takes a different course, and the amount of the stamp imposed upon them depends upon the party to whom they are made payable, and the mode in which they are to be paid. Now does the note in question fall within any, and which, of these regulations? In answering this question, we must consider what is the legal effect of the clauses respecting promissory notes. None of them include notes payable after date or after sight; then to what description of notes do they apply? Clearly to notes payable on demand; this, is the necessary legal inference; this is implied by the law; and that which the law implies, must be considered as embodied in the note. Then, upon that rule of construction, this is a note payable on demand, for it is payable in no other way, and as it is for a sum under 100*l.* it clearly requires a five-shilling stamp. It falls within the description in the 24th section, and is a re-issuable note, and consequently void for not bearing the stamp imposed upon notes of that kind. For these reasons I am of opinion that the learned Judge was right in directing the nonsuit, and therefore that we are bound to discharge this rule.

BEST, J. (*a*) concurred.

Rule discharged.

(*a*) *Holroyd*, J. was absent, at the Old Bailey.

## The KING *v.* JOHN WEBSDELL.

The manufacturer of goods cannot, without a hawker's licence, vend his wares in any other than the places enumerated in 50 *Geo.* 3. c. 41. s. 23; and a manufacturer hawking his goods in a different place, *without any licence* so to do, may be convicted in a 10*l.* penalty only, under s. 17 of the act, although s. 20 imposes a 40*l.* penalty for an offence apparently of the same description.

CONVICTION under 50 *Geo.* 3. c. 41, for hawking shoes without a licence, whereby the defendant was adjudged to pay a penalty of 10*l.* The information set out on the record of conviction stated, that defendant on a

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certain day, at *Cromer*, in the county of *Norfolk*, was a hawker and trading person, going to other men's houses, and travelling, &c. and being such person, did, on the day aforesaid, at *Cromer*, carry to sell, and expose to sale, divers goods, wares, and merchandize, to wit, a quantity of shoes, and was then and there found trading without any licence so to do; whereupon he was summoned, &c. and the Justice did convict him of the said offence, and adjudge that he had forfeited the sum of 10*l.* On appeal, the Sessions quashed the conviction, subject to the opinion of this Court, on the following case:—

It was distinctly proved on the part of the appellant, that he was a shoemaker, and that he was the real worker or maker of the shoes in question, which he "carried to sell, and exposed to sale;" but inasmuch as it appeared from the evidence, that *Cromer* was not a mart, market, or fair, nor a city, borough, town corporate, or market town, the Court were of opinion that the conviction was right, although the words "or elsewhere," omitted in 50 *Geo.* 3. c. 41. s. 23, are in the 9 & 10 *Will.* 3. c. 27. s. 9. It was then objected on behalf of the appellant, that the conviction was bad in point of form, on two grounds; first, because in setting forth the offence, it was not stated that the shoes were not of the manufacture of the appellant; and secondly, because the conviction was under sec. 20 of 50 *Geo.* 3. c. 41, and that therefore the penalty adjudged, if any had been incurred, should have been 40*l.* instead of 10*l.* On these grounds the conviction was quashed.

*H. Cooper*, in support of the order of Sessions, contended, first, that the defendant was not liable to any penalty whatever; and second, that supposing him liable, the conviction was founded on a section of the statute, which did not give the penalty adjudged. As to the first point, it must now be taken from the finding of the Sessions, that the defendant was the manufacturer of the shoes which he offered for sale; and if so, then he is clearly protected by

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sec. 9 of 9 & 10 *W.* 3. c. 27, by which it is declared, "that nothing in that act contained shall extend to hinder the real workers or makers of any goods or wares within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, &c. from carrying abroad or exposing to sale, or selling any of the said goods or wares of his, her, or their own making, in any public marts, fairs, markets, *or elsewhere*." Nothing can be more extensive than these words; and if that statute is unrepealed, it is clear that this defendant is exempted from any penalty. It certainly is not repealed by 50 *Geo.* 3. c. 41, except in so far as respects the amount of the penalties, because the 9 & 10 *W.* 3. c. 27, is therein expressly recited, and it incorporates that and all other acts relating to the same subject. Both acts were passed in pari materiâ, and although the words "or elsewhere" have been dropt in the later statute, still there is no repugnancy between the two. This must virtually be treated as a conviction under the statute of *William*, and consequently the defendant was authorised in selling the shoes in question at *Cromer*, although it is not a market town, &c. because the words "or elsewhere," would be sufficient to justify him as the real manufacturer, in selling his goods without a hawker's licence, in any place whatsoever. Any other construction would be irreconcilable with the plain language of the two statutes. Then, secondly, supposing the defendant liable to some penalty, he has been convicted and adjudged under the wrong section. If he was liable to any penalty, it was to a penalty of 40*l.* imposed by sec. 20 of 50 *Geo.* 3. c. 41. By sec. 6 a duty of 4*l.* annually is imposed on every hawker. The 17th section enacts, "that if any such hawker shall trade without, or contrary to, or otherwise than as shall be allowed by such licence, he shall forfeit the sum of 10*l.*" Now this section obviously applies to the case only of a person who having regularly taken out a licence, shall travel without it upon his person, or having taken out a licence, shall trade contrary to the terms of it. Then comes the 20th section,

upon which the objection arises. That section applies expressly to the offence of which this defendant has been convicted, namely, trading without a hawker's and pedlar's licence. It imposes a penalty of 40*l.* upon any hawker found trading without a licence, or who, being found trading, shall refuse to produce a licence when required, and no power is given to the Justices to mitigate the penalty. The defendant therefore, if he has been guilty of any offence, ought to have been convicted under this latter section, and not under the 17th, which applies to an offence of a totally different description. It is imposssble to contend that the 17th and 20th sections both apply to the same offence, for the inference then would be, that the Legislature had imposed two different penalties for the same illegal act, which would be quite repugnant to reason and justice. Having no licence at all, might very reasonably subject the party to a heavier penalty than that imposed upon a person who having taken out his licence, has neglected to carry it about his person. Hence the imposition of a larger penalty in the former than in the latter case. On these grounds therefore the Sessions did right in quashing the conviction, and their order must be confirmed.

*Russell* and *E. Alderson*, contrà, were desired by the Court to address themselves to the second point only. It is rather an unusual ground of complaint on the part of a defendant, that he has not been convicted in so large a penalty as the law imposes; but undoubtedly it lies upon the prosecutor to shew that the defendant has been properly adjudged to pay the penalty inflicted. Since the passing of the 50 *Geo.* 3. c. 41, the 20th section has never been acted upon, the sum of 40*l.* having been obviously inserted into that section by mistake. Convictions have always proceeded on the 6th and 17th sections, the former of which requires the licence to be taken out, and the latter imposes a penalty of 10*l.* for trading without a licence. But it is contended, that s. 17 applies to those cases only where a person, having taken out

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a licence, trades without carrying it about his person, or trades contrary to its terms. The case of *Rex* v. *Turner* (*a*), however, is an authority to shew, that the 17th section applies as well to the case where the party has not taken out any licence, as where he has taken it out, but omits to carry it with him, or refuses to produce it on demand. In that case the conviction was not for trading contrary to the terms of a licence, but for trading without any licence whatever, and therefore it is a direct authority. The 17th section embraces two offences; first, a trading without a licence; second, a trading contrary to, or otherwise than is allowed by the licence. It is clear that the latter provision was necessary in order that it might be seen whether the mode of trading adopted was conformable to the terms of the licence taken out. But upon the face of this conviction, there is nothing to shew that this defendant had not a licence; and therefore viewing the case in either way, it is plainly and substantially within the 17th section, and the conviction ought not to have been quashed.

Bayley, J.—There certainly is a great deal of obscurity in the terms of the 50 *Geo.* 3. c. 41, nor is it found there for the first time, for it has existed as long since as the 29 *Geo.* 3. c. 26. Sections 11 and 14, in that statute, are in terms the same as the 17th and 20th sections of the 50 *Geo.* 3. and the same difficulty as to the 10*l.* and the 40*l.* penalties occur in both statutes. It is contended, that a person who is guilty of the offence of trading without any licence whatever, is at all events liable to a 40*l.* penalty under the 20th section, and that the Court is not warranted in considering him as coming within the 17th section, which imposes a penalty of 10*l.* But in order to decide that the defendant is not within the latter section, I think we ought to be clearly convinced, because if the matter admits of a fair and reasonable doubt, we should adopt that construction which would bear with the least degree of hardship upon the individual

(*a*) 4 B. & A. 510.

who offends against the act. There is no power of mitigating the penalty; it must either be 10*l.* or 40*l.*, the Magistrate having no discretion. In considering this subject, we must look to the 17th section, and treat the question as if the case stood upon that only. The words of that section are, "That if any such hawker, &c. so travelling as aforesaid, shall trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by such licence, such person shall, for each and every such offence, forfeit the sum of 10*l.*" Now the words "shall trade *without,*" or "*contrary to,*" or "*otherwise than as shall be allowed*" by such licence, form three propositions; and therefore we must take them as if the words "such licence," were repeated in connexion with each; and each of these three things would, by the terms of that section, be prohibited. It does not say, such hawker "having obtained a licence" and trading; but "if any such hawker shall trade *without*, or *contrary to,* or *otherwise than, &c.*" There are no words then, which confine the terms of the section to a person who has previously obtained some licence for the purpose of travelling about as a hawker. The fair meaning of the words "shall trade without such licence," is, that if any person, without having ever obtained any such licence as this act, in its former provisions directs he shall be provided with, shall trade, he shall be liable to a 10*l.* penalty. Perhaps it would be difficult, exactly to see any reason why the legislature should bear harder upon a man who travelled without any licence at all, than upon a man who had obtained a licence, to a certain extent, and under colour of that licence committed a fraud upon it by going beyond its limits; but without relying upon that, I think the words "shall trade as aforesaid without such licence," may mean such licence as the former provisions of the act had directed the party should provide himself with; and I do not see in the 20th section such clear words as shew that that is not the construction which ought fairly to be put on the 17th section. From that time down to the present, (as

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far as there are any authorities upon the subject), the convictions upon this statute for trading without any licence at all, have been for the 10*l.* and not the 40*l.* penalty. When *Rex* v. *Turner* was before the Court, this, if a valid objection, might have prevailed, but it was never suggested, and in practice, we understand convictions have always been for the 10*l.* penalty. In *Rex* v. *M'Gill* (*a*), also which is now sub judice, this, if a good objection, would have prevailed, but in that case it certainly was not raised. And though I am not at liberty to treat it as an authority, yet, in the last edition of *Burn's Justice*, prepared for the use of magistrates, a form of conviction for trading without any licence whatever is adopted, by the gentlemen who have directed their attention to cases of this description, which in terms describes the forfeiture to be 10*l.* for the offence. It therefore seems to me, that the words " without such licence," in the 17th section, are not necessarily confined to a person who has obtained a licence, and is travelling without it about his person, but that it extends to persons trading without any licence whatever. If that is the right construction, the question then is, whether the 23d section exonerates the defendant from being liable to the penalty, or whether, by virtue of the provisions of the 9 & 10 *W.* 3. he will be exempted. There is no doubt, that if this had been a proceeding under the 9 & 10 *W.* 3. c. 27, and there had been no alteration from time to time in the provisions of that act, except as to the increase of duty, this person would be exempted from penalties for selling wares of his own manufacture, in a market town, &c. or *elsewhere*. But that is not an empowering clause; it merely exempts those who shall pursue conduct of that kind, from being liable to the penalties of the act for trading in that way. The 29 *Geo.* 3. enacts a higher duty, and also contains the prohibitory clause, which is found in 9 & 10 *W.* 3. and that clause being very general, the persons who would have been exempted by the 9 & 10 *W.* 3. would thereby have be-

(*a*) Vide post, page 377.

come liable. Still, however, that prohibitory clause is subject to a proviso, but there is an alteration in the terms of the proviso, which shews that the legislature intended to limit the exemption. The exemption in the 29 *Geo.* 3. is the same as that in the 50 *Geo.* 3. and in both clauses the words " or elsewhere," are omitted. Why were they omitted? Obviously because the word " elsewhere" must have occurred to the legislature as being too indefinite, and going farther than was originally intended, and consequently they were left out of both. I am therefore of opinion, that as the 50 *Geo.* 3, contains a general prohibition, and as the exempting clause only confines the exemption to those persons who shall sell goods of their own manufacture in any mart, market, or fair, and in cities, boroughs, towns corporate, and market towns, and as this defendant did not sell the goods in question in a place falling within this enumeration, he was rightly convicted.

BEST, J. (*a*).—I am of opinion that both points are as clearly against the defendant as it is possible for points to be clear in so obscure an act of Parliament. The substantial objection arises upon the word " elsewhere," and it is said, that that word must, by necessary reference, be introduced into this act. It must certainly, in order to give effect to the argument in favor of the defendant, but we are tied down by the act, as we find it in the statute book. By the 9 & 10 *W.* 3. it appears to me, that the legislature intended, that the real manufacturer of goods, should be at liberty to hawk his wares wherever he pleased, but when the 50 *Geo.* 3. was passed, the same indulgence was not extended to him. By the first act, he might sell where he thought proper without a licence, but by the second, he has now a right only to sell in markets, borough towns, cities, &c., and the words " or elsewhere" are studiously omitted. It is contended, that the only effect of the 50 *Geo.* 3. is to alter the duties, and that we are to con-

(*a*) *Holroyd*, J., was absent, at the Old Bailey.

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strue that statute as if the words "or elsewhere," had been retained; but s. 31. of 50 *Geo.* 3. shews, that the statute was meant to go much further than altering the duties, because that clause declares, that all the provisions of the former acts are repealed, except such as are thereby re-enacted. But I do not think it necessary to resort to that clause, in order to strike out the word "elsewhere," because the 53 *Geo.* 3. creates new duties, and imposes the necessity of taking out licences at a higher price, and declares that he who has not taken out such a licence, cannot hawk his goods about the country at all, and that he who has taken out one can only hawk to the extent which the licence allows under the act. This may be a very hard case, and probably this defendant did not know that *Cromer* was not a market town, and however desirous we might be, of finding out some ground for quashing the conviction, still, we are bound by the act as we find it. Then, as to the second objection, it is our duty, in construing an act of Parliament, to reconcile all parts of it if we can. That duty cannot, in this instance, be performed, because it is not easy to reconcile the 17th and 20th sections. Possibly they may be reconciled, by holding, that the man who hawks without having obtained any licence at all, shall become liable to the penalty of 40*l.*, but having obtained a licence, and hawking without having it about him, he shall be liable to the 10*l.* penalty. Whether that was the true meaning of the legislature, it is impossible for me to say, but I think the two clauses may be reconciled. It is, however, enough for me to say, that looking at the information here, and the evidence in support of it, this defendant has been guilty of an offence within the meaning of the 17th section. It does not appear that the defendant had no licence; all we have before us is, that none was produced, and that perhaps may be sufficient to convict him under the clause imposing a 10*l.* penalty. I am therefore of opinion, that this clause is not so inconsistent with the 20th section, but that the

defendant may be rightly convicted in a 10*l.* penalty, although he might have been convicted in the 40*l.* penalty.

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Order of Sessions quashed, and conviction affirmed.

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The King *v.* The Inhabitants of Bardwell.

Where a pauper was hired for a year as shepherd, and was to have a house and garden rent free, seven shillings a week, and the going of thirty sheep with his master's flock, as wages, the feed of the sheep alone being worth 16*l.* a year, and he lived for two years with his master under the agreement:—Held, first, that as it did not appear to have been part of the bargain, that the sheep were to be fed with *growing produce*; and second, that as the pauper, by residing in his master's cottage as a *servant*, did not "come to settle," he did not acquire a settlement by renting a tenement within the meaning of 13 & 14 *Car.* 2. c. 12.

BY an order of two Justices *Peter Firman* was removed from *Bardwell*, to *Ixworth*, both in the county of *Suffolk*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:—About twenty-four years since, the pauper *Peter Firman*, a married man, was hired for a year by Mr. *Stedman*, of *Ixworth*, as his shepherd; he was to have a house and garden rent free, seven shillings a week, and the going of twenty sheep with his master's flock as wages. After some time, on provisions becoming dear, and the pauper complaining that his wages were not sufficient for his support, Mr. *Stedman* raised him ten sheep. The pauper lived for two years with Mr. *Stedman*, in the parish of *Ixworth*, after his wages were thus raised, during all which time, the thirty sheep went with his master's flock on the farm, the whole of which is situated in that parish. The feed of the thirty sheep was worth sixteen pounds a year, (exclusive of the house and garden). If the pauper had not been allowed to keep the sheep, he must have had more wages.

*Storks* and *H. Cooper*, in support of the order of Sessions, were stopped by the Court.

*Dover*, contrà. This case is not distinguishable in principle, from *Rex* v. *Minster* (*a*). It was there distinctly held,

(*a*) 3 M. & S. 276.

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that the pauper gained a settlement by being allowed to feed two cows on his master's farm. In that case, the residence was in the house of the master, and the feed of the cows being worth more than 10*l.* a year, no doubt was entertained that the pauper gained a settlement. If then, the feed of two cows constitutes a tenement, what is there to distinguish that case from the going of thirty sheep, which is expressly found to be worth 16*l.* a year? Here the residence is in a cottage of the master, but that is a sufficient "coming to settle," within the meaning of the statute 13 & 14 *Car.* 2. c. 12, if there be no doubt that the going of the sheep constitutes a tenement worth 10*l.* He referred to *Rex* v. *Sutton St. Edmunds* (*a*), *Rex* v. *Cherry Willingham* (*b*), *Rex* v. *Tolpuddle* (*c*), *Rex* v. *Whixley* (*d*), *Rex* v. *Piddle Trenthide* (*e*), *Rex* v. *Houghton-le-Spring* (*f*), and *Rex* v. *Melkridge* (*g*).

Bayley, J.—This case certainly comes very near *Rex* v. *Minster*, but being distinguishable in one respect, it cannot be a decisive authority in favour of this settlement. But I also think that case is open to some observations, which would prevent me from abiding by it, supposing this to be exactly similar. In *Rex* v. *Minster* it was to a degree conceded, that the right to have the cows fed on the master's land, constituted a tenement; but the principal question raised was, whether payment of rent by service was equivalent to payment in money. After that, (which was the first case in which it was decided that the right which a servant acquired of having cattle fed on his master's land gave him a settlement,) the case of *Rex* v. *Oswald Twissell* (*h*), was brought before the Court. There, the pauper rented, among other things, the milk of a cow to be kept by the owner;

(*a*) Ante, vol. ii. 800.
(*b*) Ante, p. 14.
(*c*) 4 T. R. 671.
(*d*) 1 T. R. 137.
(*e*) 3 T. R. 772.
(*f*) 1 East, 247.
(*g*) 1 T. R. 598.
(*h*) Decided in 1818, but not reported.

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her keep made up the necessary value of 10*l.*, and she was in fact pasture fed; but the Court said, that as it did not appear to have been made matter of bargain, that she should be *pasture fed*, hiring her milk was not necessarily taking a tenement, and the order of Sessions allowing the settlement was quashed. The Court in that case held, that it was not sufficient to shew that the cows were in point of fact pasture fed, but it was necessary to prove that it was part of the original bargain. Now in this case the stipulation was, that the pauper wasto have a house and garden rent free, but that was connected with the service, and therefore, according to the decision in *Rex* v. *Minster*, must be left out of the question. Then he was to have the going of thirty sheep with his master's flock as wages; but there was no stipulation how they were to be fed. It is very probable that they would be fed upon the pasture or other growing produce of the land, to the value of more than 10*l.* a-year, but it constituted no part of the bargain that they were to be fed in that manner, and therefore, I think, *Rex* v. *Oswald Twissell* establishes a distinction between this case and *Rex* v. *Minster*, which must govern our decision. The case of *Rex* v. *Minster* again came under consideration in *Rex* v. *Sutton St. Edmunds* (*a*), and the Court acted on the principle established in *Rex* v. *Oswald Twissell.* But I think if it were not for the distinction thus pointed out, there are some observations to which *Rex* v. *Minster* is open, which, (without regard to any doubt as to the value of the pasture feeding, or whether it was a part of the original bargain that the sheep should be fed upon the growing produce of the land,) satisfy my mind that it ought not to be acknowledged as an authority on this occasion. That there is great refinement in all these distinctions there is no doubt; and it could never enter into the mind of any man but that of an extremely acute lawyer, that a person could be considered as *renting a tenement*, by any bargain which, in the character of *servant*, he might make with his master. In order to

(*a*) Ante, vol. ii. 800.

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gain a settlement, by renting a tenement, I take it to be perfectly clear, that the party must not merely rent a tenement, but he must "come to settle," according to the words of 13 & 14 *Car.* 2. c. 12. If a person comes to settle on a tenement, we are naturally to look to the nature and character of his residence. In all the cases decided on the statute of *Car.* 2, the residence of the party has been upon something which may be connected with, and constitutes part of the tenement, in respect of which he gains a settlement by residence. The question is, does he "come to settle"? There are many instances in which a man is allowed to reside in a house, from motives of kindness, rent free, and in such cases the house is considered part of his tenement, and if the house alone be worth 10*l.* a-year, he thereby acquires a settlement. But at present I am not aware of any case in which the point has been raised and decided, that the occupier of land will acquire a settlement where he does not also reside, in such a way as to constitute what I shall presently point out to be my notion of residence. The case of *Rex* v. *Houghton-le-Spring* (*a*), which has been referred to, was not decided upon this statute. There the pauper lived in the parish in which he was the owner of the property, and the decision was, that he could not be removed from his own, but that was on the principle of the common law, by which every man has a right to continue on his own property. The only case I am aware of which appears to hold a different doctrine, is *Rex* v. *Melkridge* (*b*), in which the residence was in a toll house. There the pauper occupied land in the parish in which the toll house was situated, and though his residence in the toll house could not be taken into consideration alone, so as to confer a settlement, still it was considered as a residence connected with the property which he held in the same parish, not in the character of servant, but as if he had a residence of his own. That case was decided on the principle, that it was his own residence, and that he came to settle and reside in his own

(*a*) 1 East, 247. (*b*) 1 T. R. 598.

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domicile. Now here the pauper has only a residence in the character of servant. It is true he has the house rent free, but his occupation is in the character of servant; the house, during the whole time of his continuance in it, was his master's, and it was no more than if he had been allowed to reside in a room in his master's house. Living in one of the rooms of the master's house, is not "coming to settle," nor can it be considered as contributing to what is essential in order to gain the party a settlement. For these reasons therefore, first, on the ground that it does not appear in this case, that it was part of the bargain, that the sheep in question should be fed with growing produce; and second, on the ground that this pauper had not within this parish any thing which properly could be called a residence of his own, and for that reason could not be considered "coming to settle," I am of opinion that the settlement was not gained in *Ixworth*, and that the Sessions did right in quashing the order.

Best, J. (a).—In *Rex* v. *Minster* the material point was conceded in argument. The Court in that case were clearly of opinion that the residence in the master's house was not sufficient; and I confess I am at a loss to understand how that residence, connected as it was with the service, could be considered as residing on a tenement within the meaning of the statute. The authority of that case has been broken in upon by *Rex* v. *Oswald Twissell*, and where there is a clashing of decisions, the proper course is to decide according to the language of the statute. Occupying a tenement, merely in the character of servant, is clearly not such a coming to settle as the legislature contemplated. Coming to settle on a tenement, means coming in the character of tenant, as the very words of the statute import, and not in the character of servant. The language of *Le Blanc*, J. in *Rex* v. *Minster*, is decisive upon this point. He is of opinion that the residence in the house is not sufficient.

(a) *Holroyd*, J. was absent, at the Old Bailey.

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Why? Because the servant has not an absolute right of possession in the house; it may be put an end to at the pleasure of the master. Granting that the feeding of the sheep in this case constitutes a tenement, still the same vice attends that point. This pauper does not come to settle as a tenant. He takes the feeding of the sheep in the same character as the house, namely, as a servant, and therefore he cannot be considered as renting a tenement within the meaning of the statute. The taking must be in the man's own right; but the right here is that of the master, who has the power of putting an end to the possession by determining the service. I agree that the party must come to reside on part of the tenement. These are the express words of the statute; "settle in any tenement." Now in *Rex* v. *Knighton* (*a*), the Court only decided that the party must reside either upon the tenement, or at least in the parish in which the tenement is situated. Hiring a tenement in a parish without residing, is not sufficient; the pauper must "settle" on the tenement, or he must be resident on that which may be considered part of the tenement. According to the opinion of *Le Blanc*, J., to which I have already referred, residing merely in the character of servant, is not to be considered as a residence upon the tenement in respect of which the settlement is to be gained. But without referring to cases, I am of opinion that this pauper was not coming permanently to settle in a tenement of his own, within the spirit and letter of the statute, and therefore did not acquire a settlement in this parish.

Order of Sessions confirmed.

(*a*) 2 Bott, 211.

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A labourer in husbandry hired himself from *Michaelmas* to *Michaelmas* at weekly wages, and by the terms of the contract he was to have a month in harvest to himself, and if he and his master could not agree for the harvest month, he was to harvest where he pleased. At the commencement of the harvest he agreed with his master to work on the terms then offered, and continued in the service during the whole year:— Held, that this was an exceptive, and not a conditional hiring, and therefore no settlement was gained by service under it.

ON appeal against an order of two Justices, by which *John Wiggins* and *Elizabeth* his wife were removed from *Mayland* to *Althorne*, both in the county of *Essex*, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper, at *Michaelmas*, 1821, agreed with Mr. *Croil*, a farmer in the parish of *Mayland*, to live with him as his servant in husbandry, from that *Michaelmas* till the *Michaelmas* following, at ten shillings per week for the Winter half year, and eleven shillings per week for the Summer half year; the pauper to have a month in harvest to himself, and if he and his master could not agree for the harvest month, the pauper was to harvest where he pleased. If any one offered the pauper more money than his master for the harvest month, the pauper had a right to go. At the commencement of the harvest, the master offered the pauper 5*l.* for the harvest, which the pauper at first refused, and required 5*l.* 5*s.*, but afterwards agreed to take the 5*l.*, and accordingly continued in his master's service during the whole year, and received his wages weekly.

*Jessopp* and *Walford* in support of the order of Sessions, contended, that the reservation in the agreement by which the pauper was to have a month in the harvest to himself, rendered it an exceptive hiring, and therefore this could not be considered as a hiring for a year, so as to confer a settlement. They relied upon *Rex* v. *Bishop's Hatfield* (*a*), as an express authority, and cited 1 *Nol. P. L.* 338, and *Rex* v. *Arlington* (*b*).

*Brodrick*, contrà.—This was a conditional and not an exceptive hiring, and therefore as the pauper actually served for a whole year under it, he thereby gained a settle-

(*a*) Burr. S. C. 439. (*b*) 1 M. & S. 622.

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ment in *Mayland*. There is no doubt that if this was an absolute contract, that the pauper was to have the harvest month to himself, it would be an exceptive hiring, which was the case in *Rex* v. *Bishop's Hatfield;* but this being merely a conditional hiring, the pauper gained a settlement by the year's actual service. In *Rex* v. *Bishop's Hatfield*, the pauper actually hired himself to another master during the harvest, which makes all the difference. He cited *Rex* v. *North Nibley* (a), *Rex* v. *New Windsor* (b), and *Rex* v. *St. Ebbs* (c).

Bayley, J.—I am of opinion that the Sessions have rightly decided this case. They were of opinion that this was not a conditional but an exceptive hiring. There may be nice distinctions between decided cases, but I think the distinction between a conditional and an exceptive hiring is broad and intelligible. I take a conditional hiring to be that, where the parties stipulate for the continuance of the service for a whole year, but by fixing the terms upon which the service is to be continued, it is left to the option of either to put an end to the contract. If the bargain is made so that it shall be co-extensive with the whole year, but with liberty to either to dissolve it, then it is a conditional hiring; but if the servant stipulates, that during a period of the year he shall be absent from labour, or that with respect to a particular period of the year there shall be a new bargain when the period arrives, then it is an exceptive hiring, and no settlement can be gained. In this case there is an express stipulation that the pauper shall have a month to himself in the harvest time, and if he and the master could not then agree for the harvest month, he was to harvest where he pleased. The parties therefore do not bargain beforehand as to the wages to be paid during the harvest month, but that is to be subsequent matter of contract. This is no more therefore than a hiring for eleven months, the twelfth month being scooped out of the

(a) 5 T. R. 21. (b) Burr. S. C. 19. (c) Id. 289.

original contract, and subject to a new bargain. I am of opinion that it was no more than an exceptive hiring, and that the service under it confers no settlement.

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BEST, J. (a).—I am of the same opinion. I think *Rex* v. *Bishop's Hatfield* is an authority in point, and though the pauper in that case hired himself to another master during the harvest, that makes no difference.

Order of Sessions confirmed.

(a) *Holroyd*, J., was absent, at the Old Bailey.

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## The KING v. GEORGE M'GILL.

Exposing to sale, and selling *tea* as a hawker, without a licence, is an offence against the stat; 50 *Geo.* 3. c. 41. and subjects the offender to a penalty of 10*l.*, although by 12 *Geo.* 3. c. 46. s. 6. it would be an offence for a hawker to sell tea in an *unentered place*, even if he had a hawker's licence.

The agent or servant of an unlicenced hawker, is equally liable with his principal, to a penalty, if he sells without a hawker's licence.

CONVICTION under 50 *Geo.* 3. c. 41. s. 17, for selling tea without a hawker's license. The conviction stated, that on, &c., at, &c., the defendant being a hawker and trading person, going to other men's houses, carrying to sell, and exposing to sale, without any licence so to do, certain goods, wares, &c., to wit, divers parcels of tea, and that he being such hawker as aforesaid, did, on the day and year aforesaid, at *Worcester*, carry to sell, and expose to sale, certain goods, wares, &c., to wit, divers parcels of tea, and was then and there found trading as aforesaid, without any licence so to do, contrary to the form of the statute, &c. The conviction then set forth the evidence, and stated, that the Justice did thereupon convict him of the said offence, and adjudged that he had forfeited the sum of 10*l.* Against this conviction the defendant appealed, and the same was confirmed by the Sessions, subject to the opinion of the Court, upon the following case:—

*George M'Gill*, as the agent of *David Salisbury*, a licenced tea dealer, on the 17th of *April*, 1822, in the city of *Worcester*, carried to sell several packages of tea, and then

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and there, at the house of one *Henry Grove*, sold to the said *Henry Grove*, one of the said packages, containing a quarter of a pound of tea; and afterwards, on the same day, in the city of *Worcester*, he the said *George M'Gill*, as such agent as aforesaid, carried to sell, and exposed to sale, at the house of one *William Perkes*, another package, containing also a quarter of a pound of tea, but did not sell the same. At the several times when the said *George M'Gill*, as such agent as aforesaid, so carried to sell, and sold the said first-mentioned quarter of a pound of tea, and so carried to sell, and exposed to sale, the said last-mentioned quarter of a pound of tea, neither he, nor the said *Daniel Salisbury*, his employer, had any licence according to the 50 *Geo.* 3. c. 41. The question for the opinion of the Court is, whether the defendant was duly convicted.

*Denman*, C. S. and *Winter*, who opposed the order of Sessions, being asked by the Court what were the objections to the conviction, stated them as follows. First, that this kind of dealing in tea, not being licenced at all by the Hawker's and Pedlar's Act, is equally illegal, with a licence, as without, and is therefore an offence against 12 *Geo.* 3. c. 46. s. 6, under which alone it is properly punishable. Second, that it is not stated in the conviction, that the tea was carried to sell, exposed to sale, or sold, in an unentered place, which according to the statute last-mentioned it should be. And, third, that the appellant having acted as an agent or servant to another, is not liable to the penalty imposed by either of the statutes.

*Pearson* and *Russell*, in support of the order of Sessions, contended, first, that although the appellant had offended against two separate statutes by one act, still, he was punishable by both, or either separately. Second, that the provision respecting unentered places, was no part of the statute under which the appellant had been convicted, and therefore did not apply to the case. And, third, that the

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defendant was equally liable, whether acting as agent or principal, the statute being expressly applicable to both, and they cited *Rex* v. *Turner* (*a*).

*Denman*, C. S. and *Winter*, contrà, insisted, that as the act of selling tea by the appellant, was by another statute made equally illegal, with, or without a licence, he had been guilty of no offence against the Hawker's and Pedlar's Act, and therefore could not be convicted under it; the remedy provided by the latter statute not being cumulative upon that of the former. The statute 9 *Geo.* 2. c. 35. s. 20. makes it unlawful for any hawker or pedlar to sell tea, and therefore a hawker's licence would not legalize the sale of tea by a person trading as a hawker. If the defendant has been guilty of any offence, he was punishable only under the 12 *Geo.* 3. c. 46. They cited *Roll's Abridgment* (*b*), *Beckford* v. *Hood* (*c*), and *Townsend's* case (*d*).

The Court took time to consider the case, and judgment was now delivered by

Bayley, J.—This was a conviction under the 50 *Geo.* 3. c. 41. s. 17, for selling tea without a licence, and the principal question was, whether the defendant, being a hawker, and selling tea in that character, but without a licence, was within the operation of the statute. There was another question which might have been raised, namely, whether the penalty of 10*l.*, in which he was convicted, was the proper penalty to be imposed upon him. Upon that point, the Court gave their opinion in *Rex* v. *Webdell* (*e*), in which we are further confirmed by a subsequent consideration of the case. We have looked into the several acts of Parliament relating to this subject, and upon a careful review and comparison of them all, we are of opinion that the defen-

(*a*) 4 Barn. & Ald. 510.
(*b*) 1 Roll's Abr. 106. pl. 16.
(*c*) 7 T. R. 620.
(*d*) Plowd. 113.
(*e*) See ante, p. 360.

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dant was properly convicted under this statute, and in the right penalty. The main argument against the conviction was, that as another act of Parliament has made it illegal to sell tea at all in an unentered place, even with a licence, the selling it without a licence was no offence within this act of Parliament; and if there was no statute in existence upon this point of a prior date to the two already alluded to, that argument might perhaps be tenable. But when we review the entire history of the law, relating to hawkers and pedlars, it becomes clear, that the 50 *Geo.* 3, is intended to include persons selling tea without a licence, as well as those who may so deal in any other article. The first statute is the 8 & 9 *W.* 3. c. 25, which after reciting that additional duties have been laid upon coffee, tea, &c., enacts, that *every* hawker, &c. shall pay a duty of 4*l.* Then, the 9 & 10 *W.* 3. c. 27, recites, and continues the former act, imposing the same duty on every hawker, &c., carrying to sell, or exposing to sale, *any* goods, wares, &c., and contains two clauses imposing penalties, which are very important in the consideration of this case. The former, by section 3, imposes a penalty of 12*l.* upon every hawker, &c., so trading *as aforesaid* without a licence; the latter, by section 8, provides, that the Justice, before whom any offender is convicted, " shall cause *the said sum of* 12*l.* to be forthwith levied by distress and sale of the offender's goods." We then come to the 50 *Geo.* 3. by the 17th section of which the penalty of 10*l.* is imposed, and in which three distinct terms are made use of, which it is material to examine with care. The words are, " If any such hawker," &c. " shall trade as aforesaid, *without*, or *contrary to*, or *otherwise than shall be allowed by*, such licence, he shall forfeit for each offence the sum of 10*l.*" These three distinct expressions were not hastily or unintentionally introduced, but clearly apply to there separate offences. Then section 20, referring to section 17, enacts, that the Justices before whom any offender is convicted, " shall cause *the said sum of* 40*l.* to be levied," &c. This is clearly a mistake; the 17th section

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mentions no "said sum of 40*l.*;" the sum there is 10*l.*, and it undoubtedly ought to be the same in the 20th section. The intermediate clause, nineteen, does impose a penalty of 40*l.*, and thence probably the mistake arose. The former act of 9 & 10 *W.* 3. contained no clause similar to the 19th in this act, but it does contain clauses expressly answerable to the 17th and 20th in this act; and as the sum mentioned in both clauses there is the same, it is clear that the sum should be the same in both clauses here. It is perfectly manifest, that the words "trading without such licence," in the 8 & 9 *W.* 3. means trading without having himself taken out a licence, and such also is the plain sense of the 9 & 10 *W.* 3. The next statute in point of date which refers to hawkers and pedlars, is the 25 *Geo.* 3. c. 78, but there are some intermediate statutes by which the law respecting the sale of cambrics and of tea, was in some degree altered. The 10 *Geo.* 1. c. 10. s. 14, prohibits tea from being sold in any but an entered place, thus making the right of sale local. The 9 *Geo.* 2. c. 35. s. 20, prohibits hawkers and pedlars from selling tea at all. Now, these two statutes proceeded upon very distinct views. The former had for its object, the increase of the revenue, the latter the interests of the *bonâ fide* tradesman. Upon that was founded the argument, that as the sale of tea by hawkers was prohibited altogether, the selling it without a licence could be no offence, because the general prohibition had done away the particular licence to sell. We are of opinion that such is not the legal effect of that statute. Where one law prohibits the sale of an article under certain circumstances, and imposes one penalty, and another prohibits the sale under other circumstances, and imposes another penalty, the latter does not impliedly repeal the former; it is cumulative upon it, and both remain in force, unless the first is repealed by express words. So in this case, the selling at all, is an offence under one statute; the selling without a licence is an offence under another statute; the latter is cumulative, and therefore con-

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stitutes two offences, for either of which the party is punishable. Then, in the 25 *Geo.* 3. c. 78, we first find the words "otherwise than shall be allowed by such licence" introduced, which were clearly intended to apply to hawkers selling those articles without a licence, the sale of which was previously prohibited in toto, and not protected even by a licence, and there the penalty of 10*l.* is imposed. The 29 *Geo.* 3. c. 26, repeals the last-mentioned act, but continues the penalty of 10*l.* as before; it however constitutes another offence, on which it inflicts a penalty of 40*l.*, and in providing for the levy of the first penalty of 10*l.*, it inadvertently says, "the said sum of 40*l.*" This is clearly an error, and is followed up in the later act of 50 *Geo.* 3. c. 41. From this historical view of the different statutes, it is perfectly clear that 10*l.* is the penalty intended to be imposed upon the offence of which this defendant has been convicted; and that the words "without a licence" must refer to a man who has not taken out any licence, and who has no licence in his possession any where. We are therefore of opinion, that, as the 50 *Geo.* 3. c. 41. s. 17, imposes a penalty upon every hawker selling tea without a licence, and the intermediate acts, which prohibited the selling it at all, do not relieve a party from the penalty imposed by the former act for selling *any* goods, &c. without a licence, the defendant in this case has been properly convicted, and the order of Sessions must be confirmed.

Order of Sessions confirmed.

The KING *v.* JOHN MAYALL and others.

THIS was an appeal against the allowance of overseers accounts for the township of *Quick*, in the parish of *Saddleworth*, in] the West Riding of *Yorkshire*. At the Sessions, it was objected for the respondents, that the notice of appeal was insufficient, because it did not state and specify the particular causes or grounds of appeal, pursuant to 41 *Geo.* 3. c. 23. s. 4, but merely transcribed every payment in the overseers accounts, without suggesting any matter or cause of objection thereto. The Sessions, however, over-ruled the objection, considering the mode in which the accounts had been kept, and after hearing the appeal, disallowed the overseers accounts, but reserved a case for the opinion of this Court.

A notice of appeal against the allowance of overseers accounts, that the different items thereof, (enumerating them), would be objected to without specifying the particular causes or grounds of appeal pursuant to 41 *Geo.* 3. c. 23. s. 4. is insufficient.

*E. Alderson*, now appearing to support the order of Sessions, was directed to confine himself to the preliminary objection as to the sufficiency of the notice of appeal, and he contended, that this, like all other notices, must be taken with reference to the subject-matter, and the objection here being, that there was no sufficient proof of the fact of payment of the items in the overseers accounts, the notice in question was insufficient.

BAYLEY, J.—The notice of appeal being merely general, that the different items, enumerating all of them, will be objected to, without stating for what reason any one of them will be objected to, is clearly insufficient, and therefore I think the order of Sessions must be quashed.

HOLROYD and BEST, J's., concurred.

Order of Sessions quashed.

*Littledale* and *J. Williams* were to have argued for the defendants.

## The KING v. The INHABITANTS of SHIPDHAM.

Where the owner of a mansion house and gardens, agreed with the pauper to take care of the garden, and for his so doing he was to take the issues and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master, and he was to continue in the premises for a year, unless some other person before that time should occupy the mansion, in which case the gardens were to be delivered up; and the pauper continued in the occupation of the garden on these terms for more than a year, the produce being worth to him 70*l.* per annum:—*Held*, that the pauper being only a servant, and the residence not being his own, he did not come to settle within the meaning of 13 & 14 *Car.* 2. c. 12.

TWO Justices, by their order, removed *John Hall*, his wife, and four children, from *Shipdham* to *Thursford*, both in the county of *Norfolk*, which order on appeal the Sessions quashed, subject to the opinion of this Court, on the following case:—In *March*, 1818, Sir *Charles Chadd*, leaving his mansion-house and estate at *Thursford*, agreed with the pauper to take care of his garden, hot-houses, vines, wall-trees, pleasure grounds, &c., and for his so doing the pauper was allowed to take the issues and profits of part of the garden, and to live in a cottage contiguous to the garden belonging to Sir *Charles Chadd*, of the yearly value of 4*l.*, to which a small common right was attached. The pauper was to continue in the premises for a year, before any further agreement was to take place between him and Sir *Charles Chadd*, unless some other person should, before that time, occupy the mansion, &c.; in which case the gardens, &c, were to be delivered up by the pauper. The pauper continued in the occupation of the garden under the above terms for a year and a quarter. On the hearing of the appeal, it appeared that the produce of the garden was worth 70*l.* a year to the pauper, and that the expence of keeping up the pleasure grounds, &c. together with the value of the pauper's labour, would amount to as much as the issues and profits which the pauper was allowed to take. Two points arose for the decision of the Court, first, whether, under the above circumstances, there was a coming to settle on a tenement, or whether the pauper was not a mere servant, to take care of the gardens; and second, if a tenement, whether the keeping up the gardens, &c. could be deducted from the value of the produce of the garden, and thereby reduce it under the value of 10*l.* a year.

*E. Alderson*, in support of the order of Sessions, was stopped by the Court.

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*Denman*, C. S., contrà, contended, that the pauper, under the circumstances stated in the case, must be considered as the tenant, paying rent in the shape of labour, and consequently that he thereby gained a settlement.

Bayley, J.—Where did he reside? Not upon a tenement of his own. He resided in a cottage of Sir *Charles Chadd*, and we were of opinion yesterday (*a*), that in order to confer a settlement by renting a tenement, the party must have a residence which might be called his own home, as tenant; and that where he resides in the character of servant merely, that would not be sufficient to satisfy the words of the statute "coming to settle." This pauper had the garden merely as servant.

Holroyd and Best, Js. concurred.

Order of Sessions confirmed.

(*a*) See *Rex* v. *Bardwell*, ante, p. 369

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## The King *v.* Sir Oswald Mosley, Bart.

By the *Manchester* and *Salford* Paving and Lighting Act, 32 *Geo.* 3. the tenants and occupiers of all messuages, houses, &c. *and other tenements* within the same towns, are liable to be rated. The lord of the manor of *Manchester*, being owner of the market in that town, is not liable, under this act, to be rated in respect of his occupation thereof, and the tolls arising therefrom, as the occupier of a *tenement*.

By a rate made under the authority of the 32 *Geo.* 3. c. 69, "An act for cleansing, lighting, watching, and regulating the towns of *Manchester* and *Salford*," the defendant was assessed "in respect of his occupation of the market scites, streets, lands, and tenements, at the *market place*, *Shude Hill*, *Smithy Door*, and at various other streets in *Manches-*

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*ter*, and the tolls, dues, rates, and profits in respect thereof." Upon appeal, the Sessions confirmed the rate, subject to the opinion of this Court on the following case:—

The act of 32 *Geo.* 3. c. 69, authorizes the commissioners appointed thereby, to raise money by rates or assessments, "upon all and every the several tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, or garden grounds, and other tenements, situate, standing, lying, and being within the said town of *Manchester*." The rate upon the appellant was duly made and allowed according to the requisites of the act. The appellant is lord of the manor of *Manchester*, and owner of the markets there, and of all the waste lands within the manor. The profits arising from the markets in respect of which he is assessed, are equal to the amount of the assessment. The markets are held three days in each week, in the several places named in the assessment, which are public streets in *Manchester*, over which the public have a right to pass and re-pass, subject to the holding of the markets, which holding always in a great measure, and sometimes entirely, obstructs the passing and re-passing with carts and horses. The appellant is not an inhabitant of *Manchester*, nor an occupier of the soil whereon the markets are held, except so far as the facts of this case may constitute him an occupier. The profits received by the appellant are paid to him by the persons using the markets, for the privilege of exposing their commodities to sale there, whether they effect a sale or not; if the commodities pass through several hands in the market, each person exposing them to sale, pays the appellant for that privilege. The baskets, sacks, tubs, and stalls, used by such persons, are provided by themselves, and are either carried by hand or laid on the pavement; they are not fixed to the ground. The stalls are of various sizes, and are paid for in proportion to their size. The payments for the stalls are collected weekly, but those for the baskets, sacks, and tubs, on the day on which they are used. All persons who keep stalls within the

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town and manor of *Manchester*, for the exposure of commodities to sale, pay stallage to the appellant; and every person found in the manor exposing to sale any commodity in any basket, tub, cask, or sack, pays toll for the same to the appellant, whether he is stationary, or moving about from one part of the manor to another. The sums paid to the appellant for the privilege of using the market with stalls, have occasionally varied; those paid for baskets, &c. have always been the same; respect being had to the quantity and quality of the commodities. There are butcher's shambles in *Manchester* belonging to the appellant, where the stalls are affixed to the freehold; those stalls are rated separately in the names of the actual occupiers and renters; but the appellant, by express agreement with them, pays the rates for them. These butcher's stalls are quite distinct from the other stalls above-mentioned.

*J. Williams* and *Starkie*, in support of the order of Sessions, endeavoured to distinguish this case from *Rex* v. *The Manchester Water-Works Company* (*a*), on the ground that the defendants there had no ownership of, and no interest in, the surface of the ground; whereas here, the defendant was owner of the soil upon which the market stood, and had a direct beneficial interest in the whole of the surface, and in the improvement of the town. They also contended, that as it was clear that these market tolls would be rateable if the act of parliament had used the word "grounds" or "lands," instead of the word "tenements;" the Court would, from the object of the statute, and from the relative situation of the word, consider it as equivalent to "lands," in order to give the greatest possible effect to the provisions of the act; and upon this point they cited *Co. Litt.* 6 a. and 19 b. *Rex* v. *Wickham Market* (*b*), *Rex* v. *Jolliffe* (*c*), *Rex* v. *Macdonald* (*d*), and 2 *Nol. P. L.* 7.

(*a*) Ante, vol. ii. 20.

(*b*) 3 Keb. 140. 1 Freem. 419.

(*c*) 2 T. R. 90.

(*d*) 12 East, 324.

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*Littledale* and *Parke*, contrà, were stopped by the Court, and

Per Curiam. This case is not distinguishable from *Rex* v. *The Manchester Water-Works Company*, so recently decided. That case was very fully argued and considered, and the meaning of the word "tenement," as used in the statute, was most minutely discussed and weighed. The construction which the Court put upon the word "tenements" in that case, is the only construction it can receive in the present, and therefore, as we are of opinion that the market tolls in this case are not a tenement within the spirit and meaning of the act of parliament, they are not liable to this rate, and the order of Sessions confirming it must be quashed.

Order of Sessions quashed.



The King v. The Inhabitants of Penegoes and Machynlleth, in error (*a*).

Indictment for not repairing a bridge, described as situate within the parishes of *P.* and *M.*, and averring that the inhabitants of *P.*, and the inhabitants of the township of *M.*, were liable to repair, without going on to state what part of the bridge was situate within the township of *M.*, and that the inhabitants thereof were liable to repair, is erroneous.

Error from the Quarter Sessions for the county of *Montgomery*. The indictment stated, that a certain bridge called, &c., situate within the parishes of *Penegoes* and *Machynlleth*, was ruinous and out of repair, and that the inhabitants of the parish of *Penegoes*, and the inhabitants of the township of *Machynlleth*, were liable and ought to repair the same, ratione tenuræ. The defendants having been found guilty and fined in one sum of 400*l.*, error was now brought in this Court. Assignment of errors. 1. That the indictment avers that the bridge is situate within the *parishes* of *Penegoes* and *Machynlleth*, without describing what part of it is situate within each, and without alleging that any part is within the *township* of *Machynlleth*. 2. That it avers generally that the inhabitants of the parish of

(*a*) Vide ante, vol. ii. page 209.

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*Penegoes*, and the inhabitants of the township of *Machynlleth*, are liable to repair the bridge, without describing what part each are separately liable to repair. 3. That it does not aver that the bridge is a common and public bridge. 4. That the inhabitants are not described as bodies corporate. And 5. That the inhabitants of the parish, and the township, being in fact separate bodies, were fined in one sum.

Sir *W. Owen*, for the defendants. It does not appear upon this indictment, that any part of the bridge is within the township of *Machynlleth*, and therefore there is no liability to repair alleged as against the inhabitants of that township. This is clearly irregular; *Wentw. Plead.* vol. vi. 407, *Rex* v. *St. Pancras* (*a*), and *Rex* v. *Gamlingay* (*b*). The Court stopped him and called upon

*Campbell*, contrà, upon this point, who contended, that the Court would presume that the township of *Machynlleth* was within, and part of, the parish of *Machynlleth*, and then the averment that the parish was liable, would be a sufficient averment that the township was liable also, and that the bridge, being within the parish, was within the township also. The obvious meaning of the averment was, that the bridge was situate within the township, and it was impossible to draw any other inference.

Per Curiam. It is unnecessary to discuss the other points, because it is quite clear that the indictment is defective in not averring that the bridge is situate within the township of *Machynlleth*. The Court cannot infer any thing in support of an indictment against a defendant; and in this case it might lead to very great injustice, because a whole parish might thereby be held liable, when in fact only a part was liable to repair. This indictment does not aver that the bridge is situate within the township, nor that the town-

(*a*) Peake's N. P. C. 219. (*b*) 3 T. R. 513.

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ship is situate within the parish, and in that respect it is clearly insufficient. Upon this ground, therefore, the judgment of the Court below must be reversed.

Judgment reversed.

The King v. F. T. Abell, Gent.

Where a modern charter of an ancient borough contained a clause expressly disqualifying certain persons from voting for corporate offices, but at the same time ratified and confirmed the ancient usages of the borough, by which certain other and different persons were also disqualified from voting at any nomination or election of corporate officers, and a person was elected to a corporate office in pursuance of the words of the charter, but not conformably to the ancient custom: Held, that his election was void.

INFORMATION in the nature of a quo warranto, calling on the defendant to shew by what authority he held the office of one of the Justices of the borough of *Colchester*, in the county of *Essex*. The information stated, that the borough of *Colchester* was an ancient corporation, by the name of "The Mayor and Commonalty of the borough of *Colchester*;" that there ought to be four Justices of the borough; and that the defendant, without any legal warrant, had usurped the office of one of such Justices. The defendant by his plea, admitted that *Colchester* was an ancient borough, and that there ought to be four Justices. The plea then stated, that on the 20th *February*, in the 58th year of the reign of his late majesty, the king, by his letters patent, granted, that *Colchester* might for ever thereafter remain a free borough; and that the king had thereby declared that there should be nominated and chosen out of the free burgesses, a mayor, eleven aldermen, eighteen assistants, and eighteen common council; that the persons nominated and chosen to the office of aldermen, should exercise the same during their natural lives, unless removed; that in all nominations and elections thereafter to be made, no free burgess, who, at the time of any nomination and election to be made, should *serve* as chamberlain or drawer, or in any other manner in a common inn, tavern, or victualling house, or serve another person in any business or mystery for wages or salary, or should not be master of a family within the borough, and should not pay scot and lot there, or should

have been found guilty of felony, &c. or should live by alms, should ever thereafter have a vote in any such nomination or election in any manner howsoever; that by the same letters patent, the king ordained that the mayor and recorder of the borough, and their deputies for the time being, and the alderman who was the last mayor, being the alderman next in order to the mayor, with four other aldermen, to be yearly chosen according to the ancient and established usage of the borough, should, and each of them should be the Justices and Justice, to preserve the peace within the borough; that by the said letters patent, the king ratified, confirmed, and restored to the mayor and commonalty of the borough, and their successors, all and singular so many such like, and the same liberties, privileges, rights, jurisdictions, immunities, customs, franchises, freedoms, and exemptions whatsoever, as fully, freely, and entirely, and in as ample manner and form as the men, free burgesses of the borough by whatsoever name or title they were known or incorporated, &c. used, had, or accustomed (except all and singular things in any thing contrary to these presents, &c. excepted,) to have, &c.; that the said charter was accepted by the mayor and commonalty; that by the ancient and established usage of the borough, from time whereof the memory of man is not to the contrary down to the time of granting the said letters patent, the whole commonalty, burgesses, and freemen there, (that is to say,) all manner of persons householders dwelling within the borough, bearing allegiance to the king, and being free of the borough, paying scot and lot, (*except common* INNHOLDERS, *common bakers, common brewers, common butchers, common victuallers, ganniker, chamberers, loose journeymen,* mens' children, not householders in their own persons, &c.) should yearly, upon the *Monday* next after the decollation of *St. John the Baptist,* by eight o'clock in the forenoon of the same day, assemble themselves together in the moot-hall, and then and there by their free elections, name and choose four headmen, which might dispend every of them in lands, &c. 4*l.*

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by the year, or be worth in moveables 40*l.* (to wit), out of every ward of the same town, one headman, being a free burgess of the same, and an inhabitant of the same ward, and not any of the persons before excepted: And every of the said headmen, after they had been sworn, should likewise choose unto them, yearly, five other honest and discreet persons, free burgesses, of the said town, out of every the said wards, of like value in lands or substance, (whereof two at the least of every of the said five persons of every ward should be of the council of the said town) to accomplish the number of twenty and four persons, which twenty-four persons, so chosen and sworn, after the old and laudable custom, should frankly and freely elect and charge ten aldermen, worthy and discreet persons, out of the burgesses, called the council of the borough, and out of which ten aldermen, they should yearly choose and name, of the most worthiest persons, (amongst other officers) four Justices of the Peace to serve for the year next following; that from time immemorial no free burgess, who at the time of any nomination or election to be made, shall use the trade and mystery of a brewer, baker, maltster, or butcher, or hold or keep a common inn, tavern, or victualling house, or who should serve in any common inn, tavern, or victualling house, as chamberlain, drawer, or otherwise howsoever, or that should serve in any other trade for wages, or that should not be a housekeeper, and pay scot and lot, &c. should thereafter have vote in any nomination or election in anywise howsoever; that by immemorial usage, all and every the persons who were directed to assemble for the purpose of choosing four headmen, (being persons who might dispend every of them in lands 4*l.* a-year, or were worth in moveables 40*l.*) had been, and of right ought to have been, and at the time of granting the said letters patent were, and still of right ought, to be eligible themselves to the said office of headman, and capable of being named and chosen headman. The plea then stated, that on the 3d *September*, 1821, being the *Monday* next after the decollation of *St. John the Baptist*, the free burgesses of the borough, duly assembled

themselves in the moot-hall, the same being householders dwelling within the borough, and bearing true allegiance to the king, and being free of the borough, and paying scot and lot; and the said free burgesses (being persons who did not serve as chamberlains or drawers, or in any other manner in a common inn, tavern, or victualling house, and who did not serve another person in any business or mystery for wages or salary, and who were masters of a family within the borough, and who had not been found guilty of felony, &c.) did, by their free elections, name and chuse four headmen, who were worth in moveables 40*l.*, each being one headman out of each of the wards of the town, (that is to say,) *J. N.*, *W. S.*, *W. C.*, and *A. H.* (each being a free burgess of the town, and an inhabitant of the ward for which he was respectively chosen, and no one of them serving as chamberlain or drawer, or in any other manner in a common inn, tavern, or victualling house, and not serving another person in any business or mystery for wages or salary, and who were masters of a family within the borough, &c.) and the said persons being so elected headmen, did thereupon, being first duly sworn, chuse unto them each, five other honest and discreet persons, being, &c. out of, &c. to make up the number of twenty-four persons, and the said twenty-four persons, being so chosen, did frankly and freely chuse and name out of the aldermen of the borough, &c. of the most worthy persons, four Justices of the Peace, of which four, defendant was chosen and elected one, and was afterwards duly sworn, and admitted into the said office, &c. Demurrer to the plea, and joinder in demurrer.

*Curwood*, in support of the demurrer. The question is, whether the ancient custom of electing headmen, has been so modified by the words of the modern charter, as to render the mode of election prescribed by the latter, paramount to the former. If the ancient custom still prevails, it is clear that this defendant has not been duly elected, because he has not, by his plea, shewn that his election

has been conformable to the ancient custom. By the charter it is declared, that in all elections thereafter to be made, the voters shall be free from certain disqualifying objections, namely, *serving* as chamberlain or drawer, or in any other manner in a common inn, &c., but at the same time it ratifies and confirms all ancient customs not altered by the charter. The plea sets forth, that by ancient and established usage now existing, all the free burgesses, *except common innholders*, &c., are to meet yearly on the day mentioned, and chuse four headmen, one out of each ward, (not being any of the persons before excepted, namely, innkeepers and others), and those four are to chuse twenty others, making twenty-four, who are to chuse ten aldermen out of the council, and out of those aldermen, they are to chuse the four Justices. By the ancient custom set forth, no free burgess who, at the time of *any* election, shall keep a *common inn*, &c., shall have any vote in such election. Now, the plea avers an election of the defendant, inconsistent with the custom, for it merely shews an election according to the charter, which does not in terms disqualify common innholders, and inasmuch as the custom disqualifies common innholders, the defendant was bound to shew that he was elected according to the custom. Unless, therefore, it can be clearly made out, that the charter has either totally abrogated the custom, or that the charter and the custom are so inconsistent, one with the other, that both cannot stand, the defendant's election is void. The Court stopped him, and called upon

*Tindal*, in support of the plea. The modern charter has so modified and restrained the ancient customs of this corporation, that the defendant's election is perfectly valid. It is quite obvious, that to a certain extent, at least, the ancient usages are abrogated; for instance, the aldermen are now elected for life, and therefore the Court will give a consistent sense to the charter, where the object was to alter the mode of electing Justices in so material a circumstance.

In the charter, there is a direct grant, that in all nominations and elections thereafter to be made, no free burgess, who at the time of any nomination and election to be made, shall serve as a chamberlain, &c. in a common inn, &c. shall have a vote in any such nomination or election. The charter, therefore, clearly meant to impart the right of election, to all the free burgesses, except such as were expressly excepted. This is the common law principle of construction. But independently of this, it appears from the record, that by the ancient usage of this corporation, all the free burgesses who are directed to assemble for the election of headmen, if they are persons dispending in lands 4*l.* a year, or are worth in moveables 40*l.* a year, are themselves eligible to be headmen. The charter, therefore, must be construed as abrogating all other disqualifications, but those expressly excepted, and only recognizing those customs which are not inconsistent with its provisions. In former times, undoubtedly there was an usage in the borough, which disqualified *innholders*, and other persons from voting at elections, but there may be very good reasons why in modern times respectable tradesmen of that description should be admitted to the elective franchise. This seems to have been the object of the modern charter, and therefore unless the custom is to be considered as paramount to the charter, there seems no good reason why the latter should not prevail. The question is, whether the charter is to give way to the custom. If it is not, then this election has been in conformity with the words of the charter, and the defendant is entitled to judgment. He cited *Rex* v. *Larwood* (*a*), *Rex* v. *Blunt* (*b*), and *Powell* v. *The King* (*c*).

Bayley, J.—It is a rule of construction, applicable to statutes and charters, that " leges priores posteriores contrarias abrogant." If it can be shewn that the latter are inconsistent with the former, both cannot stand, and the

(*a*) 1 Salk. 168. (*b*) Andrews, 293. (*c*) 2 Bro. P. C. 298.

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latter must prevail; but if they are not inconsistent, they are not necessarily abrogated by the latter, and they will prevail either totally or partially, as the case may be. In this case, there was an established usage in the borough existing from time immemorial, by which, common innholders, common bakers, and a variety of other persons were excluded from the right of concurring in the election of Justices. The Justices were to be chosen annually by four headmen, each headman to be chosen out of a particular ward, and they were respectively to chuse five other persons out of each ward, making, together, a body of twenty-four, who were to elect ten aldermen, and out of those ten, four Justices were to be chosen. The new charter has introduced this novelty into the ancient constitution of the borough, namely, that the aldermen, when once elected, are to serve for life, and therefore the annual election will only be to see which of the ten life-aldermen shall be the four Justices. The charter in that part does not profess, in any respect, to alter the established usage and custom, as to the persons who are eligible to vote. It does not enlarge the right of voting, or remove any disqualifications which the original foundation of the borough had introduced; it merely contains the following negative words, namely, "that no free burgess of the said borough, who at the time of any nomination and election to be made, should serve as chamberlain or drawer, or in any other manner in a common inn, tavern, or victualling house, or serve another person in any business or mystery, for wages or salary, or should not be master of a family within the borough aforesaid, and should not pay scot and lot there, or should have been found guilty of felony, &c., or should live by alms, should ever thereafter have a vote in any such nomination or election in any manner howsoever." Now, this is a disqualifying clause, applying to particular individuals, but it cannot be said, that the effect of it is to abrogate every pre-existing disqualification, and confine the disqualifications to those persons only whom it expressly points

out. The legal construction of such a charter as this, is to say, that those persons pointed out are, at all events, disqualified, and that if there are any other persons previously disqualified by the law of the borough, (which is the common law of the place) their disqualification continues. It may in many instances happen, that the crown is not apprized at the time when it grants a new charter, to what persons the disqualifications of the place extend, and therefore it says, "at all events, such and such persons shall be disqualified." It would, in my opinion, be letting in a dangerous mode of construction with reference to charters, if we were to say, that the effect of an affirmative disqualifying clause, is not merely to disqualify those persons therein named, but to remove disqualifications which the law of the place had previously established. In this case, the right of nominating the Justices is expressly regulated by the ancient and established usages of the borough. The charter refers to pre-existing usages, and indeed the defendant felt himself bound to set out what the usage was. That usage excludes from voice and eligibility common innkeepers and victuallers. But it is said, that although the charter directs, that the Justices are to be elected according to the established usages of the borough, yet, an election made by persons whom the usage excludes from voting, may still be good. I cannot concur in that proposition. It appears to me, that inasmuch as it is not shewn by the plea, that at the time this defendant was elected, he was elected according to the usages existing previously to the charter, judgment must be given for the Crown.

Holroyd, J., and Best, J., concurred.

Judgment for the King.

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The KING *v.* The INHABITANTS of KINGMORE, (in Error.)

A parish is liable as of common right to repair all highways therein, but an indictment will not lie against a district called an extra-parochial hamlet, for not repairing a public highway within the same, unless some special ground of liability to repair is alleged.

INDICTMENT against the inhabitants of the extra-parochial hamlet of *Kingmore,* in the county of *Cumberland,* for not repairing a certain part of a certain common and ancient king's highway, in the said hamlet, leading from *Longtown* to the village of *Stainton,* in the said county. The indictment alleged generally, that the defendants "ought to repair and amend the said highway when and so often as it should be necessary." On not guilty pleaded, the defendants were convicted at the *Cumberland* Quarter Sessions, and adjudged by the Court to pay a fine of 120*l.* A writ of error being brought in this Court upon the said judgment, the error assigned was "that it does not appear, nor is it alleged or shewn in the indictment, that the inhabitants of the said extra-parochial hamlet have used, and been accustomed, and of right ought to repair and amend the same road, or in what right, for what cause, by what obligation, or upon what account, the said inhabitants ought to repair and amend the same, &c." Joinder in error.

*Courtenay,* in support of the writ of error, was stopped by the Court.

*Aglionby,* contrà. The form of indictment adopted in this case is the only one which can be used with propriety against an extra-parochial district. An extra-parochial district stands, as far as respects the liability to repair highways, in the same situation as a parish. In legal construction, a parish is not to be considered according to ecclesiastical divisions, but as a district following the civil and temporal divisions. It is clear that a parish is not liable by custom, but is bound to repair as of common right. *Rex* v. *Morris* (*a*). This common right existed long

(*a*) 4 T. R. 550. See 5 Burr. 2700, and 2 T. R. 513.

before the ecclesiastical division of the country into parishes. For the purpose of liability, the civil divisions are paramount to the ecclesiastical, and therefore every district in the country is still liable to repair its roads, although it be not what is called a parish. The word "parish" does not necessarily import a place having a church; it is a word which has been introduced by misuse, till at last it has been supposed to mean a separate district. The case of *Addison* v. *Sir John Astley* (a) is an authority to shew that parishes were not at first recognized by common law, and that the word "parish" does not mean an ecclesiastical division merely, but a certain known district or division. In that case it is said, that originally the kingdom was divided into vills, which, by analogy to the division called a parish, would equally render a vill liable to repair as of common right. It is true that here the district is not called a vill, but though it is described as an extra-parochial hamlet, still it does not follow that it is to be considered as a component part of a parish. In common acceptation, the term hamlet is the same as vill. In *Rex* v. *Morris*, Lord *Kenyon* says, "vill" and "hamlet" are in common acceptation used as synonimous terms. This is also said in *Rex* v. *Welbeck* (b). It appears on record, that this hamlet is at least a known district, and it is therefore liable to repair its own highways. There is no part of the kingdom in which the liability to repair its own roads does not attach. This is a liability imposed by the common law, and if it be admitted that this is a district by itself, then the liability attaches. [*Bayley*, J. Then, if that be so, you would be able to predicate of this extra-parochial hamlet, that it was under an immemorial obligation to repair.] It is liable of common right, inasmuch as it stands in loco of a parish, though not called a parish eo nomine. There can be no immemorial right predicated of it, for there can be no immemorial usage to repair in an extra-parochial place. It is liable of common right, though not a parish, and if not liable on that ground, no liability at

(a) Freem. 2[illegible]3.    (b) 1 Bott. 34.

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all would attach. A vill would probably be liable to repair; *Rex* v. *Oxfordshire* (a), and *Rex* v. *Yarnton* (b); and these are authorities to shew that the word "vill" is a civil division, and contemplated as liable to repair at common law. [*Bayley*, J. In this case you would have this difficulty to contend with, that "vill" is a known legal term; "hamlet" is not.] But supposing "hamlet" and "vill" not to be synonimous, still a hamlet is a district, and becomes liable as of common right. He cited 1 *Inst.* 39. 7 & 8 *W.* 3. c. 29. *Vin. Abr.* tit. *Parish*, 183, and *Rudd* v. *Morton* (c).

Bayley, J.—I am of opinion that there is error on this record. It must be shewn on the face of an indictment for not repairing a road, that the parties indicted are liable as of common right, or that there is some ulterior ground on which the obligation to repair is cast upon them. A parish is liable as of common right, and therefore in such case, all that is necessary to state is, that the inhabitants of right ought to repair. It is not necessary to state, that they had repaired, but merely that the common law obligation attached to them. When, however, part of a parish is indicted, the prosecutor is bound to shew in what respect the obligation attaches. The general rule is, to shew that the inhabitants of the place from time immemorial have repaired either the particular road, or all roads lying within the district. The case of *Rex* v. *Penderryn* (d) was a presentment against a hamlet, parcel of a parish, but inasmuch as it did not allege an immemorial obligation, and had not shewn any specific cause why the inhabitants of that particular part of the parish were liable to repair, the judgment was arrested. It is insisted in this case, that the Court are bound to consider an extra-parochial hamlet as if it were a parish, and therefore liable as of common right. I think we are not warranted in coming to any such conclusion. This indictment is not framed so as to raise the question whether

(a) 1 Sid. 140.
(b) 1 Keb. 498.
(c) 2 Salk. 501.
(d) 2 T. R. 513.

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this particular hamlet is or is not of common right liable. Suppose the law to be, as stated in argument, that there is no place in the kingdom which is not bound of common right to repair the roads within it, unless it lies within a parish, still it would be necessary to shew on the face of the indictment, that the place was not connected with any other place liable, and that the law threw upon it, the obligation of repairing all its own roads. If it can be alleged, that it has time immemorially repaired its own roads, then the law throws the same obligation on a hamlet as it does on a parish; but if it cannot be alleged, that it has immemorially repaired all its own roads, then, in order to raise the question of liability, the indictment should have stated, that the extra-parochial hamlet was not part or parcel of any parish or other place connected with it; and that it was under an obligation to repair its own roads. This indictment, however, does not raise the question, and therefore we are not called upon to decide, whether an extra-parochial place, not constituting part of one general district, is or is not bound to maintain its own roads. I therefore think this indictment is bad.

Holroyd, J.—I am of the same opinion. The allegation here is merely an allegation of fact and not of law. It shews no liability on the part of the defendants to repair as inhabitants of an extra-parochial hamlet. If an extra-parochial district is to be put in the same situation as a parish, it must be shewn to be a sole district standing by itself, and lying under the obligation to repair its own roads; and that circumstance distinguishes this from the case of an indictment against a parish. Here the indictment is not framed in a manner to raise the question, whether this extra-parochial hamlet (assuming it to be completely a separate district by itself) is liable to repair its own roads.

Best, J.—If this indictment were held good, it would be a departure from the general principle on which the liabi-

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lity to repair roads attaches to parishes. Admitting that the civil are much older than the ecclesiastical divisions of the country, still it is by no means proved, that a hamlet belongs to the civil divisions. This is by name described as an extra-*parochial* hamlet. Now, though the civil are older than the ecclesiastical divisions, still *a parish* unquestionably belongs to the ecclesiastical divisions. It is admitted, that the ecclesiastical divisions have existed nine hundred years, which is two hundred years longer than necessary for common law rights to attach. No case has been cited in which it has ever yet been decided, that the mere common law obligation to repair, can be cast on any other division of the county than a parish. None of the cases cited bear out that proposition. In some cases undoubtedly the obligation to repair is cast upon the inhabitants of a particular place ratione tenuræ, or by immemorial usage; and if in this case it could with propriety be stated, that the defendants had from time immemorial repaired this road, and the indictment had contained that averment, I should have thought it sufficient. It is said, that this is a known district, and therefore the common law right attaches, but I think, if we look to the history of the civil as well as ecclesiastical divisions of the country, we shall find that all these extra-parochial places were excused from the common law burthens. If this be a defect in the law, it is for the legislature to remedy it; but attending to the principle on which the common law attaches the burthen of repair, I think this indictment is insufficient for not shewing some ground on which the burthen of repairing is cast upon these defendants.

Judgment reversed (*a*).

(*a*) Vide Magna Charta, 9 *Hen.* 3. 1 Bla. Com. 119. Skin. 685. 17 *Geo.* 2. c. 37. 1 Vent. 113.

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## The KING *v.* The INHABITANTS of GEDDINGTON.

BY order of two Justices, *John Garfield, Elizabeth* his wife, and their five children, were removed from the parish of *Geddington*, in the county of *Northampton*, to the parish of *Dunton Bassett*, in the county of *Leicester*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:—

Vendor contracted in writing with vendee for the sale of a messuage with immediate possession, at the price of 310*l.*, to be paid in two instalments, the first on 30th *November*, and the second on 24th *June* following, when the vendor was to make out a good title, and execute a conveyance, but in case of non-payment of the money on that day, the agreement to be void. Vendee having paid the first instalment, was let into, and remained in possession for more than a year and a half afterwards, but never paid the last instalment, nor had any conveyance executed. An action was brought by vendor for the remainder of the purchase-money, but discontinued upon vendee giving up the contract, and receiving back part of the first instalment:—Held, 1st. that by this contract the vendee did not gain a settlement under 9 *Geo.* 1, c. 7. s. 5. by the purchase of an equitable estate; and, 2d. that he had not such a possessory right, during the interval from the 30th *November* to the 24th *June*, as to gain him a settlement, by renting a tenement of 10*l.* value under 13 & 14 *Car.* 2. c. 12.

In *November*, 1814, the pauper, *John Garfield*, being then resident in *Geddington*, entered into the following agreement with one *Richard Nason*:—"Articles of agreement made and entered into the 24th *November*, 1814, between *Richard Nason*, of, &c. of the one part; and *John Garfield*, of, &c. of the other part, viz. the said *R. N.* doth hereby agree to sell to the said *J. G.* all that messuage, situate at *Dunton Bassett*, in the county of *Leicester*, called or known by the name or sign of the *Boot and Shoe*, together with all the out-buildings and other appurtenants thereunto belonging, at or for the price or sum of 310*l.*, to be paid at the times and in the manner hereinafter mentioned, viz. the sum of 160*l.* on the 30th of this instant, *November*; and the sum of 150*l.* on the 24th *June* next, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, from the date hereof. And the said *R. N.* doth hereby agree, at his costs and charges, to make out a good marketable title to the above premises, and to convey the same free from incumbrances at the costs and charges of the said *J. G.* on the said 24th *June* next, on payment of the said sum of 150*l.* with interest as aforesaid. And the said *J. G.* doth hereby agree with the said *R. N.* to pay him on the said 30th *November* instant, the said sum of 160*l.*, and also the further

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sum of 150*l.*, with interest as aforesaid, on the said 24th *June* next, on having the said premises, hereby agreed to be sold, conveyed to him the said *J. G.*, his heirs or assigns, or as he or they shall direct or appoint. And it is hereby agreed between the said parties, that on payment of the said sum of 160*l.*, the said *J. G.* shall be let into the possession of the said premises; but in case default shall be made by him in payment of the said sum of 160*l.*, at the day aforesaid, this agreement shall be void, to all intents and purposes. And the said *R. N.* shall be at liberty to sell the said premises by public auction, as now advertised, on the 5th *December* next, without any interruption by the said *J. G.*" The sum of 160*l.* was paid on the day appointed, and full possession then given by *Nason*, and the pauper resided in the house in *Dunton Bassett* for a year and a half and upwards; but he never paid the 150*l.* so agreed to be paid on the 24th *June*, nor was any conveyance ever executed. An action at law was brought by *Nason* for the 150*l.*; but afterwards, by an agreement between the parties, the same was discontinued; *Nason* paying the costs, and returning to the pauper 30*l.* of the said 160*l.*, and the pauper agreeing to give up the contract and the possession, which was accordingly done.

*Reader*, *Adams*, and *Holbech*, in support of the order of Sessions. The pauper is not settled in *Dunton Bassett* by the occupation of the premises mentioned in the case. It is clear that he had no legal estate in them, and there is as little reason for holding that he had an equitable estate. This cannot be considered as an equitable estate, unless a Court of Equity could be called upon to decree a conveyance. Now a Court of Equity would not decree a conveyance, unless the pauper had paid or was ready to pay the whole consideration money. The contract in this case was rescinded in consequence of the non-payment of the money; the possession of the premises was restored, and a sum of 30*l.* given back to the pauper, in order to bring the trans-

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action to a close. It must be taken therefore under these circumstances, as if the contract had never existed, and consequently the pauper never could be considered as having an equitable estate. At the utmost this is a case of doubtful equity, and a court of common law will never take notice of a doubtful equitable estate. *Rex* v. *Standon* (*a*), *Rex* v. *Toddington* (*b*), *Rex* v. *Horndon-on-the-Hill* (*c*), and *Rex* v. *Hagworthingham* (*d*). In *Rex* v. *Horndon-on-the-Hill*, Lord *Ellenborough* says, "we ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a Court of Equity to interpose in some way or other." Here there is clearly not an equitable estate, and supposing it to be doubtful, this Court cannot act upon it. [*Bayley*, J.—In *Trinity* Term, 57 *Geo.* 3. the case of *Rex* v. *The Inhabitants of Long Bennington* (*e*) was determined, which appears to me to be decisive of this. In that case the pauper agreed by parol to purchase a copyhold for 150*l.*; he paid 34*l.* in part performance of the contract, and entered into possession, and continued in near six months. Whether any specific day was allowed for paying the remainder of the purchase-money I do not know. The contract was then rescinded, because the vendor would not give an indulgence he had promised for the residue of the purchase-money, and he returned the pauper 14*l.* The question was, whether this conferred a settlement. This Court held it was no settlement, because the pauper had purchased no estate or interest in the land for which he could make a claim in equity, without paying the remainder of the purchase-money; and although an equitable estate is sufficient to confer a settlement, still the questionable right to go into a Court of Equity will not. The only difference between that case and this is, that there the agreement was by parol; here it is in writing, and it may be argued perhaps, that the pauper was irremoveable for forty days, be-

(*a*) 2 M. & S. 461.
(*b*) 1 B. & A. 560.
(*c*) 4 M. & S. 562.
(*d*) Ante, p. 16.
(*e*) Not reported.

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tween the period from the 30th *November*, when he paid the 160*l*., and the 24th *June* following.] If he was irremoveable during that period, he certainly would gain a settlement; but there is not the least pretence for saying that he was during that time irremoveable. A party must be irremoveable on the ground that the property is his own, or that he has such a vested estate either in law or equity, as that it may be called his own. But what estate had the pauper here? None. It is very true that if this was an inchoate contract, which was afterwards to be completed, he might have been considered as having a legal or equitable estate of his own from the moment he was let into possession; but until he had paid the remainder of the purchase-money on the 24th *June*, he had not a particle of title to the property, either in law or equity. This is not like the case of a purchase within the 9 *Geo*. 1; it is not the purchase of a possessory right from the 30th *November* to the 24th *June* for 150*l*., but merely an agreement to remain in possession up to that time, at which period he was to pay the rest of the money. It is clear therefore that the pauper has gained no settlement by estate. Has he acquired one by renting a tenement within the 13 & 14 *Car*. 2. c. 12? Certainly not. Assuming the messuage in question to be worth 10*l*. a year, still he did not come to settle on the property in the character of tenant, and therefore on that ground he is not settled. *Rex* v. *St. John's Glastonbury* (a). At the utmost this was a mere licence to occupy, conveying no interest, and conferring no right of settlement in the parish of *Dunton Bassett*.

*Nolan*, *Marriott*, and *Amos*, contrà. The pauper had either an equitable estate, or had such a possessory right, as would confer a settlement, by a residence of forty days. In the first place, this is an absolute agreement for the present purchase of the premises, which it would have been competent for either party to enforce on the 24th *June*.

(a) 1 B. & A. 481.

If that be so, then, independently of any other question, there is no doubt that it will, according to authorities, constitute an equitable interest, and confer a settlement when coupled with occupation. Here the agreement itself was absolute, in the first instance, and was not to remain in fieri until full payment of the purchase-money. The non-payment of the 150*l.* does not make the agreement void. It was not so treated by the parties themselves, because the vendor brought an action to recover the remainder of the purchase-money, although that action was afterwards settled. The title to the property was complete in the pauper from the moment possession was given under the agreement. Undoubtedly the title might be defeated, unless the pauper had paid the remainder of the purchase-money, and he could not himself have enforced it unless the money was so paid; but still his equitable title is complete from the moment he comes into possession, and is only defeasible upon non-payment of the remainder of the money. At all events the pauper had an interest from *November* to *June*, which rendered him irremoveable. This is not like the case of a licence to reside. It is the conveyance of a positive interest. A mere licence is personal, and no interest passes under it capable of assignment; but here there was an interest which, coupled with residence, would confer a settlement. *Rex* v. *Fillongley* (*a*), *Rex* v. *Offchurch* (*b*), *Rex* v. *Cold Ashton* (*c*), and *Rex* v. *Edington* (*d*). The cases cited on the other side are distinguishable from this, because all those were cases of doubtful equity. [*Bayley*, J.—An equitable is as good as a legal estate for the purpose of settlement. If, therefore, you can make out that the relation of trustee and cestui que trust subsisted between these parties, then the pauper would have an equitable estate.] Still that would be a doubtful equity. This is not a doubtful equity, and that makes all the difference. The case of *Rex* v. *Long Bennington* mentioned by the Court (*e*) is distinguishable from

(*a*) 2 T. R. 709.
(*b*) 3 T. R. 114.
(*c*) Burr. S. C. 111.
(*d*) 1 East, 288.
(*e*) Ante, 405.

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this, because there the agreement was by parol, and it did not appear when the purchase-money was to be paid. There the pauper had no assignable interest; he might have been put out of possession at any time; it was a mere parol promise to give him a title whenever he should pay the rest of the money. Here is a written agreement conveying a present interest in possession, and the pauper could not have been turned out. Under any circumstances, it is quite clear that from *November* to *June* the premises actually vested in him, and having paid more than 80*l.*, he could not during that period have been removed, and consequently gained a settlement. In addition to the cases already mentioned, they cited *Rex* v. *St. Michael's Bath* (a), *Wall* v. *Bright* (b), *Knollys* v. *Shepherd* (c), *Clarke* v. *Wright* (d), *Green* v. *Smith* (e), *Douglas* v. *Whitrong* (f), *Townley* v. *Bedwell* (g), *Payne* v. *Meller* (h), *Holdfast* v. *Clement* (i), and *Clinan* v. *Cooke* (k).

Bayley, J.—I am of opinion, that there was no settlement gained in *Dunton Bassett*. It is very desirable in settlement law, that the decisions of the Court should be uniform and consistent. That law throughout the kingdom is generally administered by an extremely useful body of men, to whom the country is under the highest degree of obligation for sitting gratuitously to discharge a very important duty; and the question is, whether they are to have cast upon them the obligation, not merely of being common lawyers, but also of understanding all the niceties and distinctions of a Court of Equity. The 9 *Geo.* 1. c. 7, upon which this case arises, enacts, "that no person shall be deemed or taken to acquire a settlement in any parish for or by virtue of any purchase of any estate or interest in such

(a) Doug. 630.
(b) 1 Jac. & Walk. 494.
(c) Cited in 1 Jac. & Walk. 499.
(d) 1 Atk. 12.
(e) Id. 572.
(f) 16 Ves. 253.
(g) 14 Ves. 591.
(h) 6 Ves. 349.
(i) 1 T. R. 761.
(k) 1 Scho. & Lef. Irish Ch. Cas. Temp. Ld. Red. 22.

parish, whereof the consideration for such purchase doth not amount to the sum of thirty pounds bonâ fide paid." The party therefore is to purchase an estate or interest in land, and I apprehend the word "*interest*" there means, a definitive interest, for which he contracts at the time he enters into the contract. It might originally have been considered as extending to the case of legal estates and the purchase of legal interest only; but in process of time it was decided, that where the relation of trustee and cestui que trust exists, the cestui que trust will be entitled to gain a settlement exactly as if he were clothed with the legal estate, but that was predicated of those cases only in which the party stood in the condition of a mere naked trustee, and was never extended to constructive trustees, as in the case of *Knollys* v. *Shepherd*, where the party would be considered as standing in that relation merely. The question has in different instances been before the Court, and was under consideration in *Rex* v. *Toddington*, in which my Brother *Holroyd* points out the difference between the case where a man has an equitable estate, and that where he has a mere right to go into a Court of Equity. Now *Rex* v. *Long Bennington* is so analogous to the present case, that I can find no substantial difference between the one and the other, and when once we have got a clear decision upon a point of settlement law, we ought to adhere to it. In that case the agreement was by parol to purchase a copyhold for 150*l.* and the sum of 34*l.* being paid down, the party was let into possession, but he was afterwards unable to perform his contract. The difference between that case and this is, that here the contract is in writing, there it was by parol, but the Court in giving judgment did not proceed at all upon that distinction. They considered, perhaps, from their ignorance, as a Court of Law, of what the rule in a Court of Equity might be, that the party would be entitled to go into a Court of Equity to pray a specific performance, and they said that the payment of the money,

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and being let into possession, did not constitute the relation of naked trustee and cestui que trust, inasmuch as there was a further sum of money to be paid, and that until it was paid, the seller had a beneficial interest, and consequently no settlement was gained by the contract. There is one distinction between *Rex* v. *Long Bennington* and this case. In that it did not appear, when the remainder of the purchase-money was to be paid; there was some indulgence to be granted to the vendee, but to what extent was not stated. Here the first payment was made on the 30th *November*, but the residue was not to be paid until the 24th *June*; and upon this part of the argument it is contended, that from this slight distinction between the two cases, the one ought to have no influence on the other; for it is said, that during the interval the pauper was irremoveable. If that was the legal consequence, undoubtedly it would have the effect of conferring a settlement; but the law says, that he was not irremoveable during that period. Supposing he became chargeable to the parish after a week or a fortnight from being let into possession, what was to prevent the parish officers from applying to the Justices for an order of removal? A man cannot be removed from his own; but this was not his own at law or equity, and there is a fallacy in that part of the argument, because it was not in equity his own until he paid the remainder of the purchase-money. I am therefore of opinion, that the pauper was removeable from the 30th *November* to the 24th *June*. I am of this opinion principally on the ground, that in order to confer a settlement, if the estate is equitable only, it must be such an estate as that no other person shall have any interest in it, but in the character of a mere naked trustee, and not as a constructive trustee. For this reason I think there was not such an estate in equity vested in the pauper as would confer upon him a settlement under the 9 *Geo.* 1, and the Sessions having drawn the right conclusion, the order quashing the order of removal must be discharged.

Holroyd, J.—I am of opinion that no settlement was gained by the pauper in the parish of *Dunton Bassett*. I think he had not an estate or interest either at law or equity, so as to gain a settlement under such an execution of the contract, as that stated in the case. Whether if more had been done by the vendee, whether if he had paid or offered to pay, the remainder of the purchase-money, or was prevented by the vendor from doing more than he had done, he might have acquired an estate in equity, so as to confer a settlement upon him, is a very different question. The cases which have been cited, go only to shew that if the vendee has performed part of the contract, and has been let into possession under an agreement in writing or by parol, and has offered to pay the remainder of the purchase-money, a Court of Equity will consider one party as a trustee for the other, and compel a specific performance of the contract. I think the case of *Rex* v. *Long Bennington* was properly decided, and is exactly similar to the present, with this difference, that there the contract was not in writing, and that it did not appear that there was any agreement as to the period of time for which possession was to be delivered to the vendee; but those circumstances do not sufficiently distinguish that from the present case, to induce the Court to come to a different conclusion from what was there formed. In that case there was possession delivered as well as a part-payment of the purchase-money, and if those circumstances were sufficient to induce a Court of Equity to relieve, notwithstanding the contract was by parol, they would be sufficient on the same footing as if it was in writing; but that distinction was not taken by the Court. They acted upon a principle which is equally applicable to this case. Here the contract is made on the 24th *November*; part of the purchase-money is paid on the 30th, and by agreement the vendee was to be let into possession until the 24th *June*, when the remainder of the purchase-money was to be paid, and the contract completed. The effect of the agreement to deliver possession from the

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30th *November* till the 24th *June*, when the 150*l.* was to be paid, is no more than this, that it might or might not amount to a demise for that period of time; but there is nothing to shew that this was renting a tenement of 10*l.* annual value. It is argued, that the 160*l.* or at least part of it, is to be considered as paid for the right of possession during that period, as well as for the purchase of a right to compel the completion of the contract. How much of the 160*l.* was applicable to the purchase of the right of possession, non constat. There is nothing to shew that this was a purchase to the amount of 30*l.* within the 9 *Geo.* 1, because it would depend upon the completion of the contract whether the 160*l.* could be recovered back or not. Supposing the contract to be rescinded by the default either of the vendor or vendee, I question very much whether any thing could be recovered for the enjoyment of possession during that time, for it is part of the agreement that the vendee is to have possession during that time, but there is no provision for the payment of money in case of any default by the vendee. Supposing any thing was to be paid for the occupation from *November* to *June*, non constat that it would be to the amount of 30*l.* and if not, there is no ground for saying that there is any settlement gained under the 9 *Geo.* 1. For these reasons I think this case was properly decided at Sessions.

Best, J.—I am of opinion, that the question in this case has been decided by *Rex* v. *Long Bennington.* Adhering strictly to the words of the statute 9 *Geo.* 1, perhaps "*legal*" estates or interests, are those only which this Court ought to take notice of; but it has been too frequently decided, that an equitable estate will confer a settlement, for us to disturb that doctrine. But what equitable estate is it that will confer a settlement? It is a complete vested equitable estate; not that which exists merely in claim. If an estate be given to *A.* in trust for *B.* the former has a legal estate, and the latter the equitable. His estate is

perfect, and he has no occasion to go into equity to have it confirmed in him, because he has all the interest; but if a man contracts to purchase an estate, and pays only part of the purchase-money, I deny that he has a complete equitable estate. Equity may complete it, but until he has gone into equity, and put himself in a situation to claim the judgment of the Court in his favor, he has no estate; and therefore in that respect this differs from those cases where it was held that an equitable estate will confer a settlement. The cases have never gone beyond a complete equitable estate, where the party has no occasion to apply to the aid of any Court to complete his title. In *Rex* v. *Horndon-on-the-Hill*, Lord *Ellenborough* deprecates our consideration of doubtful equitable questions. If in cases of this nature, we were to take notice of decisions in equity, it would lead to the greatest confusion. We are to be governed by the rules of law, and are not competent to decide nice questions of equity. If this Court feels itself in a situation of so much difficulty, à fortiori Courts of Quarter Sessions are not qualified to enter into such questions. This is a case of doubtful equity, and it is very questionable whether a Court of Equity would decree a specific performance, even if the vendee had been ready to tender the remainder of the purchase-money. Can we then, without overturning *Rex* v. *Horndon-on-the-Hill*, allow ourselves to enter into the discussion of such nice questions? I am of opinion that the pauper had no equitable estate, but if it be a question of doubtful equity, it affords a stronger reason for holding that no settlement was gained.

Order of Sessions confirmed.

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## The Earl of CARDIGAN *v.* ARMITAGE and Another.

*A.* being seised of the manor of *F.* and of the demesne lands thereof, and of all coal mines therein, in fee, grants to *B.* part of the lands, in fee, *excepting and reserving* to himself, his *heirs and assigns*, all tithes of corn arising therefrom, and also *excepting and always reserving* out of the said grant to himself *and his heirs*, all the coals in the lands so granted, *together with* free liberty for himself, *his heirs, and his and their assigns and servants*, from time to time and at all times thereafter *during the time* that he *and his heirs* should *continue owners of the demesne lands of F.* to sink and dig pits, or otherwise to sough and get coals in the said lands, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals, at his and their will and pleasure, he and *his heirs* from time to time giving and paying to the grantee, *his heirs and assigns*, such satisfaction for damage as the grantee *and his heirs* should sustain by reason of getting and carrying away the said coals in the said lands, as two gentlemen, neighbours, indifferently chosen by the grantor and grantee, *their heirs and assigns*, should from time to time award. An heir of the grantor, by descent, having aliened the manor and demesne lands of *F.* and the coals therein, in fee, to *C.*, the latter entered the lands granted to *B.*, and dug pits and carried away coals therefrom, and trespass being brought against him and his servant:—Held, on demurrer, 1, That under the general exception and reservation contained in the grant to *B.*, the coals remained in *A.* and his heirs, and would pass to his or their *assigns* under the word "heirs;" and 2d, that the special liberty as to the manner of taking the coals, was not restrictive, but in furtherance of the previous exception of the coals out of the grant, and would enure for the benefit of *C.* as owner, *by purchase*, of the manor and demesne lands of *F.*

TRESPASS for breaking and entering certain closes of the plaintiff, called *Upper Brick-kiln Close, Middle Field,* and *Farnley Wood,* in the parish of *Leeds,* in the county of *York,* subverting the soil, digging shafts and pits, and raising therefrom, carrying away, and converting, a quantity of *coals.* Pleas, first, that the said closes from time immemorial until the alienation and conveyance after mentioned, had been and then were parcel of the manor of *Farnley*; and that long before the making of the said alienation and conveyance, Sir *Thomas Danby,* knt. (since deceased) was seised of the said manor and the demesne lands thereof, with the appurtenances, and of all coal mines, coal pits, and coals lying under the said manor in his demesne as of fee; and the said Sir *Thomas,* so being seised on the 16th of *January,* 1649, enfeoffed *Thomas* Viscount *Saville* (then Earl of *Sussex*) of and in divers messuages, lands, woods, and hereditaments, and (amongst others) of and in the said three several closes in which, &c. "*except and always reserved* unto the said Sir *Thomas, his heirs and assigns,* all tithes of corn and grain arising, &c. within the said several messuages and farms; *and also except and always reserved out of the said feoffment* unto the said Sir *Thomas and his heirs, all the coals* in all or any of the said lands, woods, grounds, and premises, TOGETHER WITH FREE LIBERTY

for them, the said Sir *Thomas* AND HIS HEIRS, AND HIS AND THEIR ASSIGNS AND SERVANTS, from time to time, and at all times thereafter, *during the time that he the said* Sir *Thomas* AND HIS HEIRS *should continue owners and proprietors of the demesne lands of* FARNLEY, to sink and dig pits, or otherwise, to sough and get coals in all and every the lands, woods, grounds, and premises, and to sell and carry away the same, with carts and carriages, or otherwise, to dispose of the same coals at his and their wills and pleasures, he, the said Sir *Thomas and his heirs* from time to time giving and paying *unto the said Earl, his heirs and assigns,* such sufficient satisfaction for all such damages as he the said Earl and his heirs should from time to time sustain, by reason of the digging of pits, soughing, getting, and carrying away the said coals, in all or any of the said lands, woods, grounds, and premises, as two gentlemen, neighbours, thereunto being indifferently chosen, by the said last-mentioned Earl, and the said Sir *Thomas, their heirs and assigns,* should from time to time award: To hold the same premises unto the said Earl, his heirs and assigns for ever." By virtue of which feoffment the said Earl became seised of the said premises in his demesne as of fee, the said Sir *Thomas* remaining seised in the demesne lands of the said manor of *Farnley,* and entitled to the said coals in the said premises, so aliened as aforesaid, together with such liberty before mentioned: That the said Sir *Thomas* afterwards on 8th *August,* 1660, died seised of the said manor and the demesne lands thereof, whereupon the same descended to *Thomas Danby,* his son and heir; upon whose death on 1st *August,* 1667, the same descended to *Abstrupus Danby,* as his next cousin and heir; upon whose death on 19th *September,* 1709, the same descended to one other *Abstrupus Danby,* his son and heir; upon whose death on 1st *January,* 1748, the same descended to one *William Danby,* as his son and heir. And the said *William Danby* being so seised, on 20th *January,* 1776, duly made and published his last will and testament, and thereby devised all his messuages, lands, tenements,

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and hereditaments, at *Farnley* and elsewhere, in the West Riding of the county of *York*, to his son *William Danby*, his heirs, executors, administrators, and assigns for ever; and on 1st *March*, 1776, died so seised, and thereupon the said *William Danby* the son, became seised, and afterwards on 22d *December*, 1800, by deed of bargain and sale, made between the said *William Danby* of the one part, and *James Armitage*, Esq. of the other part, the said *William Danby* for and in consideration of a certain sum of money therein mentioned, and then paid by the said *James Armitage* to the said *William Danby*, did bargain and sell unto the said *James Armitage*, his executors and administrators, all that the said manor or lordship of *Farnley*, with its rights, members, and appurtenances, and all and singular the coals, mines, veins, seams, and quarries of coal open or unopen, lying and being in or under (amongst other lands) the said three several closes in which, &c. with the appurtenances, To have and to hold the same unto and to the use of the said *James Armitage*, his executors, administrators, and assigns, from the day next before the day of the date of the said indenture, for the term of one whole year from thence next ensuing, and fully to be complete and ended. By virtue of which indenture, and by force of the statute made for transferring uses into possession, the said *J. A.* became and was possessed of the said tenements, with the appurtenances, for the said term so to him granted, the reversion thereof, with the appurtenances belonging to the said *W. D.* his heirs and assigns: and the said *J. A.* being so entitled, and the said reversion belonging as aforesaid, afterwards, on 23d *December*, in the year last aforesaid, by a certain other indenture of release made between the said *W. D.* and the said *J. A.* the said *W. D.* for and in consideration of, &c. did grant, bargain, sell, alien, release, and confirm unto the said *J. A.* and his heirs, all and every the said tenements and premises by the said last-mentioned indenture of bargain and sale, bargained and sold to the said *J. A.* with the appurtenances, and the reversion

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and reversions, remainder and remainders, and all the estate, right, title, interest, property, claim, and demand of the said *W. D.* of, in, or to the same, To have and to hold unto and to the use of the said *J. A.* his heirs and assigns for ever. By virtue of which said last-mentioned indenture, and by the statutes made for transferring uses in possession, the said *J. A.* became seised in his demesne as of fee in the said reversion of the said manor, and owner, &c. and entitled, &c. with such liberty, &c.; and the said *J. A.* being so seised, afterwards, on the day and year aforesaid, died intestate, leaving the said defendant his eldest son and heir-at-law, and thereupon the said defendant became seised in his demesne as of fee of the said manor, and owner and proprietor of the said demesne lands, and lawfully entitled to the said coals and culm in and under the said three several closes, in which, &c. together with free liberty for him the said defendant, and his servants, to sink and dig pits, or otherwise to sough and get coals and culm in each and every part of the said closes, in which, &c. and to sell and carry away the same, at his free will and pleasure, he the said defendant giving and paying unto the said plaintiff such sufficient satisfaction, &c. Wherefore the said *Edward Armitage* in his own right, and the said *William Newton*, as his servant, and by his command, &c. (justifying the trespass in the usual form) with an averment that the defendant *Edward Armitage* always has been and still is ready and willing to make satisfaction to the plaintiff, &c. and did in fact chuse one *A. B.* to award concerning the same; but that plaintiff refused to concur in chusing any person for that purpose, and concluding with a verification. Second plea in the same form, only stating the death of *Abstrupus Danby* the son to have occurred " on the 19th *September*, 1768—that *William Danby* bargained and sold to *James Armitage*, his executors, &c. " all that, the said manor or lordship, *or reputed manor or lordship* of *Farnley*"—that " the said *James Armitage* being so *interested* as aforesaid"—that " the said *James Armitage* became and was

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*seised* (omitting the words "in his demesne as of fee") of and in the said reversion, &c.—that the defendant "hath been and still is seised in his demesne as of fee of and in the said manor, with the appurtenances, *and the said demesne lands thereof, and at the said several times when, &c. was in the actual occupation thereof,* and lawfully entitled to the said coals and culm in and under the said three several closes, in which, &c. Wherefore and because the said plaintiff, before the said several times when, &c. and whilst the said defendant was so seised as aforesaid, had wrongfully raised, dug, and got divers large quantities, to wit, 500 tons of coal in and from the said veins and seams of coal in the said declaration mentioned, and then lying and being in and under the said three several closes in which, &c. and had deposited and laid the same; and the said last-mentioned coal at the said times when, &c. was lying and being in and upon the said three several closes, in which, &c. the said *defendant*, and the said *other defendant*, as his servant, and by his command," justifying the trespass for the purpose of carrying away the coal, and concluding with a verification. General demurrer to the pleas and joinder in demurrer.

The case was argued before *Bayley, Holroyd,* and *Best,* Js. at the Sittings after last *Easter* Term, by *Tindal* for the plaintiff, and *Littledale* for the defendant, when the Court took time to advise thereon, and judgment was now delivered by

BAYLEY, J. (a) who, after stating the pleadings, proceeded—The first plea in this case raises two questions, first, whether the defendant is entitled to the coals under the closes in question, he not claiming by descent under Sir *Thomas Danby,* but by purchase; and, second, whether for the purpose of getting the coals he is entitled to use the means in the plea stated. The second plea raises the former

(a) The judgment comprehends so full a detail of the arguments on both sides, and the cases cited, that it is deemed unnecessary to set them out.

of these questions only. Both questions depend upon the effect of the exception in the deed of feoffment of 16th *January*, 1649, namely, "except and always reserved out of the said feoffment unto the said Sir *Thomas Danby* and his heirs, all the coals in all or any of the said lands, woods, grounds, and premises, *together with* free liberty for them, the said Sir *Thomas* and his heirs, and his and their assigns and servants, from time to time, and at all times thereafter, during the time that he the said Sir *Thomas* and his heirs should continue owners and proprietors of the demesne lands of *Farnley*, to sink and dig pits, or otherwise to sough and get coals in all and every the lands, &c. and to sell and carry away the same with carts and carriages, or otherwise dispose of the same coals at his and their wills and pleasures, he the said Sir *Thomas* and his heirs, from time to time, giving and paying unto the said Earl, his heirs and assigns, such sufficient satisfaction for all such damages as he the said Earl and his heirs should from time to lime sustain by reason of the digging, sinking of pits, soughing, getting, and carrying away the said coals in, &c. as two gentlemen, neighbours, thereunto being indifferently chosen by the said Earl and the said Sir *Thomas*, their heirs and assigns, should from time to time award." It was contended on the part of the plaintiff, that this exception gave nothing beyond a limited right, so long as Sir *Thomas Danby* and his heirs only, *by descent*, should continue owners of the demesne lands of *Farnley*; and, on the part of the defendant, it was contended, that the exception either gave an absolute and perpetual right in fee-simple in the coals, or at least that it gave the special liberty reserved, so long as the owner of the coals should also be the owner of the *Farnley* demesnes. It may not be improper to state, that the argument proceeded on the ground, that the exception is in the very words stated in the pleadings, and that those are the words expressed in the deed, but the instrument being stated on the pleadings according to its legal operation, we should not be

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warranted probably in assuming that these are the very words of the deed; but we are bound to construe the expressions set out, as being the legal effect and operation of the instrument. And I mention this partly, and perhaps principally, with a view (it not being the foundation of the judgment of the Court), that if this case is to proceed to a further course of inquiry, as has been intimated, it may be desirable for the plaintiff to consider whether it would not be advisable for him with that object, to obtain some amendment in the frame of the record, before he requires the case to be further argued. The counsel for the plaintiff, if I understood him rightly, disclaimed all formal exceptions to the pleas, and stated the object to be, to ascertain whether Mr. *Armitage* had a right to the coals, and if so, whether he had a right to get them in the manner stated in the plea, and on those questions the opinion of the Court is founded. The exception in question contains the words "except and always reserved." In *Co. Lit.* 47 a. a distinction is pointed out between an exception and a reservation. An exception, it is there said, "is ever a part of the thing granted, and of a thing in esse;" and so says *Sheph. Touch.* 78. A reservation "is always of a thing not in esse, but newly created or reserved out of the land or tenement demised. *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.*" Another rule as to exceptions may be found in *Sheph. Touch.* 100, namely, "The exception is always taken most in favour of the feoffee, lessee, &c. and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also; as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them, and he or the vendee may cut them, and take them away." *Plowd.* 15, 16.

20 *Vin. Abr.* 520. *Hodgson* v. *Field* (*a*), and *Gerrard* v. *Cooke* (*b*). The language of this feoffment is "except and always reserved" out of the estate, not the estate taken from the coals. The coals were part of the thing granted—part of the land in esse at the time of the conveyance. The consequence therefore is, that if these words amount to an exception, they operate in point of law in the manner pointed out in *Co. Lit.* 47 a. The coals were never out of Sir *Thomas Danby*, and without any words of inheritance to his heirs, would have remained in him and his heirs. That may be collected from *Sheph. Touch.* 100; and according to the rule already mentioned from the same authority, if there be an exception of a right to have the coals, the right to do all things necessary to obtain them would be excepted also. It was indeed conceded in argument, that had the exception stopped when it had excepted and reserved the coals to Sir *Thomas Danby* and his heirs, and that had there been no words by which the exception was limited, as to sinking pits and getting them, it would have enured without any restriction to Sir *Thomas Danby* in fee; and his heirs and assigns would have a right for ever to do what was necessary to get the coals. But it is upon the ground that the *express liberty* is limited and restrictive of the former exception that the plaintiff makes his claim. The question therefore is, whether the express liberty restrains the former exception; and if it does, to what extent it restrains it. The express liberty is introduced by the words "together with," as if there was an intention to increase and not diminish what had preceded. The express liberty is for "Sir *Thomas Danby* and his heirs, and his and their assigns and servants, during the time that he and his heirs should continue owners of the demesne lands of *Farnley*, to sink and dig pits, or otherwise to sough and get up coals, and sell and carry away, or otherwise to dispose of them at his and their will and pleasure, Sir *Thomas* and his heirs making such satisfaction to the Earl and his heirs and assigns, as

(*a*) 7 East, 613. (*b*) 2 New Rep. 109.

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two gentlemen, neighbours, to be indifferently chosen by the Earl and Sir *Thomas*, their heirs and assigns, should award." It may be taken as a clear proposition of law, that an express liberty does not always control what had otherwise passed; and that is especially the case, if the express liberty goes beyond what would be implied. To give it a controling power, the intention that it should have that effect, ought to be perfectly plain. The case of *Stukely* v. *Butler* (a) is a strong authority upon this point. In that case the Earl of *Sussex*, as lord of the manor of *Cleave*, demised certain wood lands in that manor for three lives, excepting all timber trees, and then bargained and sold those trees to one *Edward George*, and he covenants that *George* and his assigns during five years, might fell and carry the trees, without any interruption of the Earl or any others; and to make sawing-pits, and to square and cut the timber upon the ground during the said term; and *George* covenanted that he would fill up the pits, and make all things fair, and amend the fences. The grant to *George* was general, not fixing any limit of time at which he was to cut the trees. He did not cut them till after five years from the time of bargain and sale, and an action of trespass being brought, the question upon special verdict was, whether the covenant on the part of Lord *Sussex* with *George*, to take the trees, within the five years next after the grant, should so check and control the grant, that he might not take the trees after the five years; and Lord Chief Justice *Hobart*, who reports his own opinion, held, that it clearly should not, because as the trees were absolutely given to *George* and his assigns, they might take them when they would, and his opinion was founded on two reasons, strongly applicable to this case:—" First," he says, "it is clear, that by the grant of the trees by a tenant in fee-simple, they are absolutely passed away from the grantor and his heirs, and vested in the grantee, and go to the executors or administrators, being, in understanding of law, divided as chattels

(a) 1 Hob. 168.

from the freehold; and the grantee hath power incident and implied to the grant to fell them when he will, without any other special licence, which can never be restrained by a power given by the grantor in the affirmative, which the grantee had before." He then cites 8 *Ass.* 10. and *Dyer*, 19, and refers to the known rule, "that statutes which are taken by intent, shall not by an affirmative, alter a former power." In 8 *Ass.* 10, one granted a rent of ten pounds a year to the husband and the wife for their lives; and if the wife survived, she was to have three pounds a year for life; and yet it was adjudged, that the wife should hold her ten pounds a year; otherwise if it had been said that she should have three pounds a year and no more. In *Dyer*, 19, the lessor covenanted that the lessee might take thorn by assignment of the lessor's bailiff; whether the lessee might take the thorn without assignment, was the question, and it seemed that *Bauldwin* and *Fitzherbert* thought he might, because the old law gave him a right by implication. Lord *Hobart*'s second reason is this:—"The covenant on the part of the grantor hath its necessary use, though it work nothing in the restraint of time for felling, for it gives power to dig, and make saw-pits upon the ground, and to square the timber there, which the grantee could not do by the simple grant of the timber, without such a special warrant. It also contains a general warranty, that the grantee may take and fell timber without the let or interruption of any person or persons whatsoever." Now apply both these reasons to the case in question. First, the exception here is, by the tenant in fee, to himself and his heirs. It therefore retains the coals in him and his heirs in fee-simple, with the power incidentally and impliedly, as they are absolutely excepted, for him, his heirs and assigns and servants, to take them when they will; and it may be questionable, at least, whether this power can be restrained by a special power given in the affirmative; second, the special power has its necessary uses, for it goes beyond the incidental power which the law implies. The incidental power would

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warrant nothing but what was strictly necessary for the working of the coals. It would allow no use of the surface of the soil for depositing the coals, further than was absolutely necessary; it would allow of no attendance upon the land of unnecessary persons. It would be questionable, at least, whether it would authorise the deposit for the purpose of sale, or whether it would authorise other persons to come on the land to view the coals. It is different from trees which are standing, for in that case the purchaser might go and see them, in order to form a judgment whether he will buy, if they are local and cannot be removed for the purpose of being viewed; but it is otherwise as to coals. The express power in this case gives greater latitude in these respects. It authorises Sir *Thomas Danby*, "to sink and dig pits, or otherwise to sough and get coals, and to sell and carry the same away with carts and carriages, or otherwise to dispose of the same coals at his will and pleasure." This power would authorise him to make new pits when necessary; it would warrant a deposit, and continuance of the coals on the land for the purpose of sale, and authorise the introduction of customers for the purposes of sale. It has, therefore, in the language of Lord *Hobart*, "its necessary use, though it works nothing in restraint" of the incidental right which Sir *Thomas Danby* and his heirs would otherwise have had. This case of *Stukely* v. *Butler*, as it seems to me, is a strong authority against the point for which the plaintiff contends, namely, as to the narrowing and restraining the general exception, by words of express power. There is, however, another case to the same effect, namely, *Hodgson* v. *Field* (a). In that case, liberty was granted to make two sough pits in given parts of the soil, and those pits were accordingly made, and after some time, a new pit being necessary for the purposes of repair, it was made. It was argued for the plaintiff, on demurrer, that the special privilege of making two pits in the places specifically pointed

(a) 7 East, 613.

out, superseded the right of making any other pits, but the Court held that it had no such effect; that the right of repairing was incident to the grant, and as it was not a special restraint, the grantee was entitled to do what was necessary for such repairs, and the pit in question being necessary, the defendant was warranted in making it. But if in this case there were no authorities against the plaintiff, and without relying to the extent, to which I think we should be warranted in relying, upon the case in *Hobart*, and upon *Hodgson* v. *Field*, (supposing this to be a mere question of intention upon the effect of the exception, and the liberty with which it is followed, and that we were at liberty to assume, that the plea has stated the bare words of the feoffment, and not its legal effect) I cannot collect from the exception, that it was the intention of the parties to the feoffment, that it should be limited, and restrained to the period during which the *Farnley* demesnes should continue in the heirs of Sir *Thomas Danby*, in a course of descent. On this narrow ground, namely, the construction which ought to be given to the words in question, the Judges concur, in thinking that in this case judgment should be given for the defendant. To restrain an exception, the language of which is unlimited, the words should be plain, and the intent clear. The limitation of the express powers in this case is, "during the time that Sir *Thomas Danby*, and his heirs, should continue owners and proprietors of demesne lands of *Farnley*;" and this question immediately occurs, what is meant by the expression, "Sir *Thomas Danby*, and his heirs?" If these words are used in the most restrictive sense, the liberty would end the moment the demesnes were directed from a course of descent, a construction, which the law generally leans against as being in restraint of alienation, and requiring very clear words to support it. The moment a settlement or devise was made by which the course of descent would be broken, the liberty would cease, although the heirs at law might be the person to take. Can any rational ground be suggested

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for such a provision? If the object was to secure the working of the coal mines within some reasonable period, why not specify the period? Why leave it to an event, which might or might not happen? Why put so capricious a check upon the ordinary and clear rule by which estates are governed? If the word "heirs" is used in the ordinary and extensive sense, it would include "assigns" as well as "heirs," and the power would continue as long as these coals and the demesnes belonged to the same person, whether by descent from Sir *Thomas Danby*, or by purchase. And it is in this sense, probably, that the words were intended to be used. The stress laid in the argument upon the use of the word "assigns," in some part of the feoffment, and the omission of it in others, (assuming that the plea states the very words of the feoffment), affords no solid or safe ground for regulating our decision. It is inserted in the exception as to the tithes, but it is uselessly and unnecessarily inserted there, because, whether that exception would have enured or not to Sir *Thomas*, and his heirs, *by descent*, it would enure to his and their heirs and assigns. It is omitted in the exception as to the coals, but it is not necessary it should be there, and why may not the framer of the deed have omitted it, knowing that it was useless? Is it a safe rule of construction, that because the framer of a deed has introduced an useless and unnecessary word in one clause, and omitted it in another, the omission is to justify us in putting a different construction upon the two clauses, when, for aught we know, both were intended to have the same effect? Indeed, in this case there are parts of the feoffment which would shew how unsafe it would be to act upon that ground, without great caution. The liberty is coupled with a provision for making compensation to the Earl, and his heirs and *assigns*, for such damage as they shall sustain; but though the damage may be done by Sir *Thomas's assigns*, there is no provision, in terms, by which they are bound to make satisfaction. By the terms of the feoffment, the satisfaction is to be made by Sir *Thomas*, and his heirs only.

Suppose Sir *Thomas* and his heirs had alienated for ever, and became insolvent, the assigns of the Earl could not look for payment, either to the alienor or alienee. Here the satisfaction is to be made to the Earl, his heirs and *assigns*, for damage sustained. But what damage? For such damage as he, his heirs assigns should sustain, by the act of Sir *Thomas*, and his heirs. The word "heirs," therefore, includes "assigns." If not, what would be the consequence? Suppose the Earl were to alien in fee, and his alienee sustained damage, there would be no words to give him satisfaction, because the damage would not be sustained by the *Earl or his heirs*. This is sufficient to shew, that no safe reliance can be placed on the insertion or omission of the word "assigns," in any clause of the grant; for assuming that the word "heirs," is used in its larger sense, it is sufficient to include "assigns." We are therefore of opinion, that the defendant is entitled to the coals, and if he is not entitled to the incidental right of getting them, which is not necessary to decide at present), he is at least entitled to the liberty expressly reserved by the feoffment, and being alienee in fee of the coals, and present owner of the demesne of *Farnley*, judgment must be given for him on both pleas.

Judgment for the defendant.

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## The KING *v.* The INHABITANTS of TAVISTOCK.

Where the Sessions on appeal quashed an order of removal, on the ground of its appearing that the pauper had not been *adduced* and *examined* before the removing Justices, touching his settlement, and it not being stated, that the pauper had not been *summoned* before the removing Justices; this Court quashed the order of Sessions, and directed a re-hearing of the appeal.

*Semble.* It is not essential to the validity of an order of removal, that the pauper should be examined, but if it is possible, the Justices are bound to examine him; and if they corruptly omit to summon him for that purpose, they are liable to an information, or to an action at the suit of the pauper, if he is removed illegally.

A CASE from Sessions stated, that by an order of two Justices, *Richard Williams* was removed from *Tavistock*, in the county of *Devon*, to *Calstock*, in the county of *Corn-*

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*wall*, in which parish the pauper was adjudged to have a derivative settlement from his father; *Calstock* appealed against the order of Sessions. In the course of the appeal it appeared, that an examination of *George Williams*, the father, touching the settlement of the pauper, had been taken on oath, but that the pauper himself, then of full age, resident with his father in *Tavistock*, and who had been so resident nine days previous to the said examination of his father, in every respect competent to, and capable of being examined, had not been *adduced* before the magistrates, and that no examination of the pauper was ever had previous to or at the time of making the order of removal. Thereupon the Sessions stopped the further progress of the appeal; and quashed the order, subject to the opinion of this Court, upon the facts above mentioned, whether the order could be supported, the pauper not having been examined.

*Gaselee* and *Carter*, in support of the order of Sessions. The question here is, not whether the order be good on the face of it; but whether the magistrates did a legal act in removing the pauper without taking his examination. The case states, that the Sessions quashed the order, because the fact that he was not examined, appeared to them in the course of the appeal. Now the general rule is, that the pauper is to be examined touching his settlement, not merely for the sake of his evidence, but in order that he may have the opportunity of shewing cause against a step which is undoubtedly against his liberty. There may be exceptions, as where the pauper is sick, infirm, or unable to attend before the magistrates from other sufficient cause. The cases of *Rex* v. *Wykes* (*a*), *Rex* v. *Bagworth* (*b*), and *Rex* v. *Everden* (*c*), and *Comberbach*, 478, are authorities to shew that the pauper ought to have notice and be heard, where it can be done, before his removal,

(*a*) 2 Stra. 1092. (*b*) Cald. 179. (*c*) 9 East, 101.

and that the Court will grant an information against magistrates making an order if they have omitted to summon him through wilful neglect. Even in cases of sickness or infirmity, the 48 *Geo.* 3. c. 124, s. 4, enacts, "that whenever any poor person is by age, sickness, or infirmity, unable to be brought up before the magistrates, to be examined as to his or her settlement, it shall be lawful for one magistrate to take his or her examination, and report the same to other magistrates, and for the said magistrates, on such report, to adjudge the settlement of the pauper, and make and suspend the order of removal as fully and effectually and to all intents and purposes as if the pauper had *appeared* before the magistrates." It appearing, therefore, that the pauper here might have been examined, but was not, the Sessions did right in quashing the order of removal.

*Nolan*, contrà, was stopped.

Bayley, J.—If this order had been quashed generally, it would have been conclusive between the parties, but being quashed on a specific ground therein stated, it is not conclusive. Whether, if the form of the order of Sessions had been different from what it now appears, it would be good, we cannot decide; but taking it that the order of removal was quashed, because the pauper was not *adduced* before the Justices, I think the order of Sessions, on that ground, should not stand. The question is, whether the facts here stated, warranted the Justices in quashing the order of removal upon that ground. I agree to this, (and I wish it to be distinctly understood), that it is the duty of the magistrates to endeavour to procure the attendance of the pauper, and if they are guilty of criminal neglect, in that respect, and corruptly make an order of removal, without endeavouring to get the pauper before them, they are certainly liable to be punished criminally. It may be a great hardship on a pauper to be removed, and therefore

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he ought, for his own sake, to have an opportunity of being heard against a proceeding which is to operate immediately on his person, and to a certain degree, in restraint of that freedom to which he is entitled, if he is forced from one place to another by means of the order of removal. But when an order is quashed, because the pauper was not *examined*, then we must look to the order for the purpose of seeing whether there has been such culpable neglect on the part of the persons who made it, as to make it the duty of the Court to quash it. The statement of the case is not very distinct. It is stated, that the Sessions quashed the order, subject to the opinion of the King's Bench, "whether such order of removal, the pauper not having been examined, could be supported under the following facts." The facts are then stated, and it is said, that the pauper being capable of being present, "had not been *adduced* before the magistrates." Had he been *summoned?* That does not appear. He might have been summoned, and neglected to appear; or he might have been present before the magistrates, but not himself desiring to say any thing upon the subject of his settlement, and the magistrates being of opinion, that the account given by the father in his presence, was sufficient ground for removing, might have made the order of removal. It does not appear, from the beginning to the end of this case, whether the pauper was *summoned*. If he had been summoned, and wilfully neglected to appear, the magistrates might proceed to make an order upon other evidence. There is no doubt of that, and therefore, though I think, generally speaking, it is the duty of the magistrates to do all in their power to obtain the pauper's attendance, and (unless there is an examination of other persons in his presence, respecting his settlement, and in whose testimony he acquiesces) to take his examination, yet, I think it does not afford any ground for quashing an order of removal, in a case in which it does not distinctly appear, that the pauper was not *sum-*

*moned* to give his evidence before the magistrates. That does not appear in this case, and therefore I am of opinion that the order of Sessions should be quashed, and the case sent back to be re-heard.

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Best, J. (*a*).—I can find nothing in the statute of *Car.* 2. by which the magistates are *ordered* to examine the pauper; nor can I find any case in which it is said to be absolutely essential to the validity of an order of removal, that the pauper should be examined. The only authority is that of Lord *Holt*, C. J. in the anonymous case in *Comberbach*; but so far from saying that the order of removal would be invalid for want of the pauper's examination, all his Lordship says, is, "that if the pauper can be examined, it is fit and proper that he should be examined, but it is not absolutely necessary." This clearly shews, that it could not be the opinion of that learned Judge, that the order of removal would not be good generally, though the pauper was not examined. I am clearly of opinion that it is not essential to the validity of an order of removal that the pauper should be examined. But I beg to state, that it is the duty of the magistrates on all occasions, if it is possible, to examine the pauper, because he may know a great number of facts which no other person can know. It is fit, also, in a case in which the interests of the pauper are so materially affected, that he should be called upon and asked whether he has any thing to allege why the magistrates should not remove him from the place in which he then happens to be resident. This power of the magistrates to remove is not so great now as it was formerly, for since Mr. *East's* bill, the magistrates cannot remove the pauper until he actually becomes chargeable; but before that act, the magistrates could remove a person likely to become chargeable. The duty of the magistrates, which I have pointed out, does not affect the validity of the order itself; but the magistrates should understand, that though we hold

(*a*) *Holroyd*, J., was absent, at the Old Bailey.

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this order of removal to be good, yet they are not to make removals without examining the pauper in every case where it is possible. They may expose themselves to great inconvenience, and under certain circumstances render themselves liable to a criminal information; and even if the case should not be of a description which would warrant the Court in granting an information; yet if a pauper has been improperly removed, there can be no doubt that he may maintain an action for any injury he has sustained in consequence of the improper removal. It is therefore extremely important that magistrates should be on their guard against removing a pauper without just grounds.

Order of Sessions quashed, and the appeal directed to be reheard.

END OF TRINITY TERM.

# CASES

## ARGUED AND DETERMINED

IN THE

## *COURT OF KING'S BENCH,*

IN

## MICHAELMAS TERM,

IN THE FOURTH YEAR OF THE REIGN
OF GEORGE IV.

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### CARGEY *v.* AITCHESON (*a*).

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Declaration stated, that plaintiff (*b*) and defendant, by articles of agreement, submitted themselves to the award of *J. T.*, *J. R.*, and *T. C.*, concerning several matters therein recited (namely, that plaintiff, defendant, *G. A.* and *D. A.* had brought and defended several suits originating in one transaction; that in one of them, the assignees of *J. T.*, a bankrupt, had recovered against the present plaintiff 2500*l.*; that disputes existed between the present plaintiff and defendant, respecting the value of the stock and goods which they had respectively received from a certain farm, and respecting the proportion of the 2500*l.* to be paid by each of them under an agreement made between them before the trial; and also respecting the costs of bringing and defending the several suits aforesaid); that the arbitrators having taken the said matters into consideration, awarded, that defendant should pay to plaintiff 444*l.*; that plaintiff should pay five-eighths, and defendant three-eighths of the costs of the said several suits; that the money already paid by either of them, should be considered as part-payment of his proportion; and that upon payment of the 444*l.* and the costs, mutual releases should be executed:—Held, on demurrer, that plaintiff might recover; for nothing appearing on the record to shew that the arbitrators had not taken *all* the matters into consideration, and as plaintiff being originally liable for the whole 2500*l.*, must continue liable for all except the 444*l.* awarded to him; the first part of the award was sufficiently certain:—Held, also, that the second part of the award was sufficiently certain, because it would be made so by the taxation of the costs by the master, and that it would also be final if no dispute existed respecting the amount of the money already paid; and that if such dispute did exist, or if the arbitrators had neglected to consider any of the matters submitted to them, defendant should have pleaded the fact instead of demurring.

DEBT on an award. The declaration stated, that certain differences having arisen, and being between plaintiff and defendant, on, &c. at, &c. by articles of agreement made between them, reciting that an action was then lately pending in the Court of King's Bench, between *Cargey*, as

(*a*) This, and the three following cases, were argued at the Sittings after last *Trinity* Term, but were unavoidably omitted in the last number of these Reports.

(*b*) Vide ante, vol. ii. 222.

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plaintiff, and one *Thomas Purvis*, as defendant, which was tried at the then last Assizes for *Northumberland*, and a verdict found for the defendant; reciting further, that another action was depending in the same Court, wherein the assignees of one *John Tarleton*, a bankrupt, were plaintiffs, and *Cargey* was defendant, and which was tried at the same Assizes; reciting further, that there were several actions depending between the said assignees and the said defendant in the present action, *George Aitcheson*, and *David Aitcheson*, relating to the same transaction; reciting further, that it was agreed, that a judgment in the action by the said assignees against the present plaintiff, should be recorded for the plaintiffs, with 4000*l.* damages, and that a rule of Court was drawn up, that upon payment of 2500*l.* to the plaintiffs, and immediate possession of a certain farm at *Great Ryle*, in the county of *Northumberland*, being delivered by the said *G. A.* and *D. A.* the tenants thereof, to their landlords, the said judgment shall be satisfied; that all the actions pending for the same transactions should be discontinued, and that each party should pay his own costs; reciting further, that divers disputes and differences had arisen between the present plaintiff and defendant, respecting the value of the stock and goods which each of them received into their custody from the said farm, and their keep and feeding by the plaintiff, and also concerning the sums which, according to an agreement made between them before the said Assizes, they respectively should contribute towards the payment of the 2500*l.* and the costs incurred in bringing and defending the said actions brought and defended by the present plaintiff and defendant *G. A.* and *D. A.*; and that in order that the said differences might be amicably settled, the present plaintiff and defendant had agreed to refer the same to *J. T.*, *J. R.*, and *T. C.* as thereinafter mentioned: It was witnessed, that for ending all disputes and differences between the said parties thereto, plaintiff did thereby covenant with defendant, and defendant did thereby covenant with plaintiff, that they, plaintiff and

defendant, would truly perform the award of the said *J. T.*, *J. R.*, and *T. C.* of and concerning the said matters in difference. The declaration then averred, that the arbitrators made an award, which, after reciting the articles of agreement, was set out as follows:—We, the said *J. R.*, *J. T.*, and *T. C.* having taken upon ourselves the burthen of the arbitrations, and having heard and weighed the allegations of both the parties concerning the matters so in difference as aforesaid, and examined the various vouchers, documents, and evidence relating thereto, do, by these presents in writing, under our respective hands, award, that all disputes and differences now, or heretofore subsisting between them, or between the said *Gilbert Cargey* and *James Aitcheson*, relative to the matters referred to us by the articles of agreement, shall henceforth cease and determine. And we further award, that the said *James Aitcheson* do and shall pay unto the said *Gilbert Cargey*, on, &c. the sum of 444*l.* And we do hereby further award, that the said *Gilbert Cargey* shall pay, or cause to be paid, five-eighth parts, and the said *James Aitcheson* shall pay three-eighth parts of all costs incurred either in prosecuting the action brought by the said *G. Cargey* against *T. Purvis*, or of defending the several actions wherein the assignees of *J. Tarleton*, a bankrupt, were plaintiffs, and the said *Gilbert Cargey*, *James Aitcheson*, *G. A.* and *D. A.*, were defendants, or any or either of them. And we further award, that all such sums of money as the said *Gilbert Cargey* and *James Aitcheson* have already paid, laid out, and expended for and towards, or on account of the said suits, or any or either of them, or any way connected therewith, shall be considered and deemed as part-payment of their respective shares, according to the proportions above-mentioned. And we further award, that all expences attending this arbitration and of these presents, shall be paid and satisfied by the said *Gilbert Cargey* and *James Aitcheson*, in equal shares and proportions; and lastly, we further award, that the said *Gilbert Cargey* and *James Aitcheson* shall, upon

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payment of the sum of 444*l.* and the costs, charges, and expences of the said several suits, and the charges and expences of this arbitration, execute unto each other mutual and general releases and discharges of all actions, &c. relating to the premises so referred, or any of them, from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement. Breach, non-payment of the sum of 444*l.* Demurrer to the declaration, and joinder in demurrer.

*F. Pollock*, for the defendant. There are two objections to this award; first, it is not made in pursuance of the submission; and second, it is not final. The direction that one party should pay a certain specified sum of money to the other, is not consistent with the authority vested in the arbitrators, which was, that they should ascertain the value of the stock and goods, and determine what proportion of the 2500*l.* and of the costs each party should contribute. The arbitrators could not properly get rid of that calculation by awarding that one party should pay a particular sum, nor were they justified in laying down proportions which would render a new calculation respecting the costs necessary. In *Matthews* v. *Price* (*a*), which was the exact converse of the present case, the submission there being, that an estimate of certain expences should be made, it was held, that an award of a sum certain was bad; secondly, the award is not final, but on the contrary, necessarily calculated to produce fresh litigation. The direction that the sums already paid by the parties (those sums not being ascertained) should form part of the proportions hereafter to be paid, must of necessity lead either to an action or an arbitration, in order to ascertain their amount; and if either of the parties should already have advanced more than his proportion, he would find no remedy in the award, and the discussion would be endless. In both respects, therefore, the award is bad.

(*a*) C. P. not yet reported.

*Wightman*, for the plaintiff. The Court will not set aside the award upon the ground of uncertainty, if by any reasonable construction it can be rendered final. Now, as the plaintiff was in the first instance liable for the whole sum of 2500*l*., and the award directs that the defendant shall pay the proportionate sum of 444*l*., it is by irresistible inference clear, that the plaintiff is to pay a sum certain, namely, the balance. With respect to the costs, the direction is as specific as it was possible at the date of the award to make it; each party is ordered to pay a certain proportion, and as the taxation must fix the amount of the costs, and thereby render that part of the award certain, the maxim of law, *id certum est quod certum reddi potest*, applies, and this case falls within the principle of those that have been decided on that ground. *Beale* v. *Beale* (*a*). [*Bayley*, J. The arbitrators might have waited until the costs were taxed, and so have obviated the difficulty.] At least the award is both in pursuance of the submission and final as regards the 2500*l*. and therefore the plaintiff may recover upon the present breach, which is confined to the specific sum of 444*l*. because the award may stand good for that part, although it may be bad in other respects. *Hanson* v. *Liversedge* (*b*). [*Bayley*, J. That, perhaps, may be so, as regards the costs of suit, because there is a proper officer by whom they must, as a matter of course, be regulated; but this award is not confined to the costs of suit.] The arbitrators clearly intended to confine their award to those costs, and the Court will act upon their intention, if it can be fairly ascertained from the language they use. But if they have awarded other costs, they have exceeded their authority in so doing, and that portion of the award may be rejected without vitiating the former part which is good. *Bargrave* v. *Atkins* (*c*). After payment of the 444*l*. and the proportion of the costs, the plaintiff would have no remaining demand upon the defendant, because then mutual releases are to be executed; and as the claim in the present

(*a*) 1 Rol. Abr. 251, pl. 14. (*b*) 2 Ventr. 242. (*c*) 3 Lev. 413.

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action is confined to the 444*l.* in whichever point of view the case is considered, the plaintiff is certainly entitled to recover that sum.

*F. Pollock*, in reply. The cases cited on the part of the plaintiff, do not apply. Where it does not appear in the submission what are the points in difference, they may be shewn by evidence, and so the award may be rendered certain. But in that respect this case differs from all those relied on, for here the submission does state the points in difference, and unless the award has decided upon all, it is bad. Here, the personal expences of the parties were within the submission; if it is uncertain whether the arbitrators have taken them into consideration at all, the award is bad on that ground; if it is to be admitted that they did take them into consideration, it is bad also, because in that part it is not final.

BAYLEY, J.—Upon the whole I think the plaintiff is entitled to recover. The action is brought upon an award, and it is clear that the plaintiff must be entitled to recover upon that part of it on which he has assigned a breach, unless the Court is warranted in saying that the award is bad in toto. It is objected to as being contrary to the submission, and not final; but those objections ought to be substantiated by the defendant, and by matters which appear upon the declaration itself. The award certainly introduces, with reference to the costs, some matters not contained in the submission, but upon the effect of that we are not called upon to decide; the question before us arises upon the pleadings, and to them exclusively we must look. The matters within the submission are the value of the stock and goods, received by the respective parties, the expence of their keep and feeding by the plaintiff, the sum which they had previously agreed to contribute towards the payment of the 2500*l.*, and the costs of the several actions. Now, by virtue of the judgment recovered against him, the

plaintiff is liable for the whole of the 2500*l.* except so much as the award directs the defendant to contribute. The award recites, that the arbitrators have taken into consideration all the matters in difference, and then directs that all disputes shall cease, and that the defendant shall pay a specific sum of 444*l.* That imports that the arbitrators, after due consideration of all the matters submitted to them, thought that justice would be done by the defendant's paying that sum, and we cannot presume any omission of duty on their part as an argument against the validity of the award. That part of the award therefore is good. Then how does the question stand with respect to the other objection? It is said that upon the subject of the costs, the award is not final. The submission is of the costs and expences incurred in bringing and defending certain suits, and although the award does not fix the sum to be paid in that respect, it may be ascertained by the taxation of the master, and a reference to him for that purpose would not vitiate the award. Perhaps, indeed, that would be the only effectual way of doing justice in the case, for until the costs were taxed, the arbitrators could not know what sum to award, and an award of a proportion of the amount when taxed, was a more equitable mode of arrangement than the nomination of any specific sum. Another objection, and one that for some time pressed upon my mind, was, that the award directs the expences already incurred to be allowed as part of the proportion to be contributed by each. That would, or would not make the award final, according as the amount of those expences was or was not ascertained and agreed on; but if there existed any doubt or difference upon that subject, it was for the defendant to have shewn it by his plea, and as he has not pleaded any such fact, I think we cannot assume it for him. I am therefore of opinion, that the award being good as to the sum of 444*l.*, the plaintiff is entitled to judgment on the demurrer.

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Holroyd, J.—Upon these pleadings we cannot consider this award as not being final. It is the province of the party who objects to the award, to plead his objection, and to state all the facts upon which it is founded, in his plea. When the question is as to the amount of costs to be paid on each side, it is no legal objection that the specific sum is not named, because that remains to be ascertained by the officer of the Court upon taxation; it is enough if the proportion is fixed as it is here. It is said, that the arbitrators have travelled out of the submission, by awarding the payment of personal expences, and as to that part, it may be that the award is void; but that circumstance will not avoid it altogether, because the rule is, that where an award falls short of the matters of reference, it is void in toto; but where it exceeds them, it is void only quoad the excess. If it had been alleged in the plea that the sums already expended were in dispute, that might have vitiated the award; but upon demurrer I am of opinion that it is certain and final enough.

Best, J.—The Court will always support an award unless the objection against it is unanswerable; for they will always presume that justice has been done by an arbitrator, until the contrary is clearly made out. Two objections are taken against this award, that it is uncertain and not final; but they both appear to me to be insufficient. As respects the 2500*l.*, the award is abundantly certain, for it orders a sum of 444*l.* to be paid by the defendant, and provides, that upon that payment being made, releases shall be executed, and all claims cease. It is also, in my opinion, sufficiently final as respects the costs, for it directs that each party shall pay a certain proportion. The mode of payment, namely, the allowance of the expences already incurred, as a part of the costs, certainly was not within the submission, and that cannot operate to avoid the other parts of the award. The general rule is, that the arbitrator shall fix the sum to be paid; but that does not

extend to costs, because it is out of his power to ascertain what the amount will be; that is to be decided by the proper officer appointed for that purpose; and therefore it is sufficient to award a certain proportion of such amount as that officer shall afterwards fix. That has been done in the present case, and therefore there is no doubt left upon the minds of the parties, and no inquiry to be made.

Judgment for the plaintiff.

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The Earl of ST. GERMAINS *v.* WILLAN and Another, Executors of J. WILLAN.

Plaintiff by indenture demised to *J. W.* defendant's testator, certain premises, to hold from 29th *September*, 1820, for eleven years. *J. W.* covenanted, inter alia, that he would not *during the lease* sell or convey away from the premises any straw grown thereon during the *leased term*, except wheat-straw and rye-straw; and that for every load of hay, wheat-straw, and rye-straw, which should be sold or conveyed away from the premises during the *leased term*, he would bring back a load of dung. Plaintiff covenanted that *J. W.* should have the use of the barns, &c. for the receiving of his crops grown upon the premises during the last year, before the end of the term thereby granted, and for certain other purposes, until 1st *May* next after the expiration of the said term, without paying any rent for the same. The fourth breach alleged, that *J. W.*, *during the said leased term, to wit, on 30th* September, 1820, *and on divers other days, between that day and 1st* May, 1821, did convey away from the premises large quantities of hay, &c. without bringing back a load of dung for each load of hay, &c. Plea to so much of that breach as respects the conveying away hay, &c. *during the said leased term*, that *J. W.* did bring back a load of dung for every load of hay, &c. conveyed away; demurrer to the residue of that breach, and joinder in demurrer. Plea, to all the breaches, and to so much of the fourth breach as respects the conveying away hay, &c. *during the said leased term*, respectively, a release of all causes of action, except such claim as plaintiff had in respect of *J. W.* not bringing back dung for the hay, &c. conveyed away after 29th *September*, 1820. Demurrer and joinder. Held, first, that the plea to part of the fourth breach covered the whole of that breach, and therefore the demurrer to the residue was a nullity; and, second, that as the *leased term* by construction of law continued for certain purposes up to 1st *May*, 1821, and the release expressly excepted the acts done after 29th *September*, 1820, the plea of release did not answer all that it professed to answer, and being bad in part was bad altogether.

THIS was an action of covenant on an indenture of lease. Plaintiff demised to *J. Willan*, the testator, certain lands and premises, to hold from 29th *September*, 1809, for eleven years then next ensuing. *J. W.* covenanted that he would not, *during the lease*, sell or convey away from off the premises any of the straw which should grow thereon during the thereby *leased term*, except wheat-straw and rye-

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straw, or sell or convey away any of the dung which should arise from the said premises during the thereby *leased term*, except the dung made of the straw grown in the last year next before the expiration of the term thereby leased, which the said *J. W.* agreed to leave in the yards belonging to the farm-houses on or before 1st *May* in such last year, for plaintiff or other person next entitled to the possession of the premises: and that for every load of hay, wheat-straw, and rye-straw, which should be sold or conveyed away from off the premises during the thereby *leased term*, the said *J. W.* would bring to the premises one large cart-load of rotten dung, or other good and proper manure, and spread the same in an husband-like manner. Plaintiff covenanted, that it should be lawful for *J. W.* to have the use of the barns, &c. for the receiving of his crops of corn, grain, and hay, which should grow upon the premises in the last year next before the end, expiration, or sooner determination of the term thereby granted, and for threshing out the said crops of corn and grain, and for spending of the straw, hay, and stover, which should arise therefrom with cattle, except wheat-straw and rye-straw, until 1st *May* next after the expiration of the said term, without paying any rent for the same; the said *J. W.* leaving all the muck, &c. arising from such corn, grain, and hay, for the use of the persons entitled to have the premises immediately expectant on the determination of the said lease. The declaration assigned as breaches: First, that *J. W. during the said lease*, and before 1st *May*, 1821, to wit, on 30th *September*, 1820, and on divers days between that day and 1st *May*, 1821, did sell and convey away from off the premises a large quantity of straw, not being wheat-straw or rye-straw, which grew thereon. Second, that *J. W. during the said lease*, to wit, on, &c. did sell, &c. a large quantity of dung, which arose and was made on the said leased premises. Third, that a large quantity of dung was made in the last year next before the expiration of the term leased by the said indenture; but that *J. W.* did not leave the same in the yards belonging to

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the farm-houses for the use of the persons next entitled to the possession of the premises. Fourth, that *J. W. during the said leased term*, to wit, on 30th *September*, 1820, and on divers other days, between that day and the said 1st *May*, 1821, did sell, &c. large quantities, to wit, 10,000 loads of hay, 10,000 loads of wheat-straw, and 10,000 loads of rye-straw, which had grown upon the premises during the term, but did not bring back a large cart-load of rotten dung for each load of hay and straw. Fifth, that although *J. W.* had the use of the barns, &c. until 1st *May* next after the expiration of the term, and although a great quantity of oat-straw, pea-straw, hay and clover arose and grew upon the premises, from which a great quantity of dung was made, yet he did not leave the same upon the premises for the use of the persons entitled to have them immediately expectant on the determination of the said lease. Pleas to the first and second breaches, traversing the acts therein alleged. To the third breach, that *J. W.* did leave the dung in the yards for the use of the persons next entitled, as in the said indenture mentioned. Fourth plea, to so much of the fourth breach as respects the selling, &c. from the said premises, *during the said leased term*, the said quantities of hay, &c. in that breach mentioned, which had arisen and grown on the said premises during the said term, that *J. W.* did bring back one large cart-load of rotten dung for every load of hay, &c. so sold, &c. during the said leased term; and demurrer to the residue of that breach. Fifth plea, to the last breach, that *J. W.* did leave the quantities of dung, &c. therein mentioned for the persons next entitled, &c. Sixth plea, to the first, second, third, fifth, and so much of the fourth breach as respects the selling, &c. of hay, *during the said leased term*, respectively, a release of all causes of action, &c. except such claim as plaintiff had in respect of *J. W.* not bringing back, &c. dung for the hay, &c. conveyed away after 29th *September*, 1820. Replication taking issue on the first five pleas; joinder in demurrer to the fourth breach, and general demurrer to the sixth plea. Joinder in demurrer to the sixth plea.

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*F. Pollock*, for the defendants. The only doubt in the case is, whether the release is an answer to that part of the fourth breach to which it is pleaded; to all the other breaches it is a perfect answer. [*Bayley*, J. Unless it is good as to the fourth breach, it is bad as to all, because it is not pleaded separately to each. The general rule of pleading is, that any plea pleaded generally to several breaches, if bad as to one, is bad as to all.] Such a rule must be productive of much inconvenience; this plea, though bad in some respects, may be good so far as it is applicable. [*Bayley*, J. Suppose the case of a general demurrer to a whole declaration; it is clear that if one count is good, the demurrer is bad in toto; and where is the distinction between that and the present case?] The release is pleaded "respectively" to all the counts, and substantially applies to each; why then should the defendants be driven to plead the same matter five times over, when it may be sufficiently stated in one plea? [*Bayley*, J. In an action for trespass by cattle, a plea of justification to several trespasses, if bad in any one particular, is bad in all.] That is a very distinct case from the present; there the defendant would profess to answer two separate charges by one plea; but here the release is pleaded "respectively" to all the counts, and therefore is put upon the record as a separate answer to the allegation of each. A general demurrer so worded would be good, and the same principle will support this plea. [*Bayley*, J. The general rule is laid down in many cases, and is directly against the present argument; the only exception to it is to be found in *Dowsland* v. *Thompson* (*a*), in favour of a plea of set-off, where it is held that "two parts of a plea of set-off are as two counts in a declaration; and, if one part be good, a general demurrer to the whole is bad." *Holroyd*, J. The general rule is strongly laid down by Lord Chief Baron *Comyn* (*b*), and in the case of *Webb* v. *Martin* (*c*).] The objection now raised is a matter of surprise

(*a*) 2 Sir W. Bl. 910.
(*b*) Com. Dig. *Pleader*, E. 1. 36.
(*c*) 1 Lev. 48.

upon the defendants, and the Court therefore will think it right to grant them leave to amend; but as respects the demurrer to the fourth breach, the defendants are entitled to judgment. [*Bayley*, J. The fourth plea covers the whole of that breach, and therefore the demurrer is bad, because there is no residue in fact to demur to.] That argument would equally bar the plaintiff from having judgment on that breach; but there is a residue not covered by the plea. The term expired on the 29th of *September*, 1820; beyond that time the lease conferred a mere licence to use the premises for a specific purpose, and imposed no obligation to bring back manure for the straw carried away after the expiration of the term. The words *leased term* in the fourth breach, are under a videlicet, and do not confine the proof to the 29th of *September*, 1820; but the plaintiff cannot recover for the acts alleged to have been done after that period. It was impossible, therefore, to take issue upon the whole of the fourth breach, and the defendants were compelled to demur to that part of it which would have introduced evidence of acts done after the expiration of the lease. Upon the demurrer to that breach therefore the defendants are clearly entitled to judgment.

*Chitty*, for the plaintiff, was stopt by the Court.

Bayley, J.—It would be as useless to the defendants in this case, as it would be contrary to our practice in general, to suffer them to amend in this stage of the cause. It has long been an established rule in pleading, that a plea which does not answer all the matters which it professes to answer is bad in toto, and the present plea of release clearly falls within that description. If the release had been pleaded regularly to all the breaches, it would not have been an answer to the action, because the term did not wholly expire on the 29th of *September*, 1820, but was for certain purposes to continue up to the 1st of *May* following; and that it might be so extended, the cases of *Wiglesworth* v.

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*Dallison* (a) and *Beavan* v. *Delahay* (b) have expressly decided. This instrument therefore was by construction of law a lease up to the 1st of *May*, 1821, and the release cannot be an answer to all the allegations in the fourth breach, because it is distinctly confined to acts done previous to the 29th of *September*, 1820. With respect to the defendants' demurrer, it is perhaps hardly necessary to give any decision, because the sixth plea is altogether bad; but as the fourth plea covered the whole time during which the plaintiff could have given evidence, the demurrer is a nullity. If the term expired on the 29th of *September*, 1820, no allegation of acts done after that period could operate to extend the plaintiff's right of action. The plea is to acts done "during the *leased term*," and therefore it embraces the whole term, whatever that might be, and a demurrer to the residue cannot be supported. Upon these grounds the demurrer of the defendants must be over-ruled, and that of the plaintiff allowed.

Holroyd and Best, Js., concurred (c).

Judgment for plaintiff on demurrer to the sixth plea; and defendants' demurrer to fourth breach over-ruled.

(a) 1 Doug. 201.
(b) 1 Hen. Bla. 5.
(c) Vide 1 Saund. 28. n. 2. 3. Willes, 30. & 122.

## Catherine Greig v. Richard Talbot.

Declaration in debt on a joint and several bond, in the penal sum of 1000*l.* conditioned for the performance of an award to be made on or before the 1st *February*, averred, that before that time expired, the parties to the bond, by deed-poll, indorsed on the back of the bond, agreed to give the arbitrators further time, till the 1st *March*, to make their award, and that the award was accordingly made within the enlarged time, but not performed by the parties against whom it was made:—Held, on demurrer, that debt was maintainable upon the bond.

Debt on bond, whereby defendant, one *William Redman*, and one *George Moth*, became jointly and severally bound to the plaintiff in the sum of 1000*l.* upon the con-

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dition following; namely, that if *Redman* and *Moth* should abide and perform the award of *J. Cull, T. Heather*, and *D. Mialls*, elected and chosen as well on the part and behalf of *Redman* and *Moth* as of the plaintiff, concerning all matters in difference between them, so that the said award should be made by the arbitrators on or before the 1st *February* next ensuing the date thereof, then the obligation to be void, or else remain in force. The declaration then averred, that after the making of the said writing obligatory, with the said condition, and before the said 1st *February*, in the condition mentioned, to wit, on the 29th *January*, each of them, the said *Redman, Moth*, and the said defendant, by a certain deed-poll under his hand, and sealed with his seal, indorsed on the back of the said writing obligatory, and by each of them respectively, then and there delivered to the plaintiff, and the plaintiff by her certain deed-poll, under her hand and seal, bearing date the day, &c. last aforesaid, and by her delivered to *Redman* and *Moth* and the defendant, did, for themselves respectively, give and grant unto the said arbitrators, in the condition of the said writing obligatory mentioned, further time for making their award, of and concerning the several matters by the said condition of the said writing obligatory referred to them, until the 1st day of *March* then next ensuing, so that they, or any two of them, made their award on or before that day. The declaration then averred an acceptance of the reference by the arbitrators, and that before the 1st of *March*, to wit, on the 26th of *February*, they had duly made and published their award, which was set out. Breach, non-performance of the award by *Redman* and *Moth*. Special demurrer to the declaration, assigning for cause principally, that the award of the arbitrators was not made within the time limited by the condition of the bond, and joinder in demurrer.

Before the argument on these pleadings commenced, the Court suggested to the plaintiff's counsel the propriety

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of amending, but as he pressed for the opinion of the Court in the present state of the record, he was allowed to proceed.

*R. Bayly* in support of the declaration. This action is maintainable in its present form against the defendant, though he stands in the situation of a surety. The defendant might be liable, perhaps, in another form of action upon his implied covenant, but it is sufficient to shew that he is liable in debt for the penalty of the bond. In order to sustain the present declaration it is necessary to establish two propositions; first, that a condition in a bond or other instrument which is executory, may be defeated or altered by another condition substituted in lieu of it by an instrument of as high a nature, so as to render the first void, and the last operative; and, second, that the indorsement on the bond in this case operates as a new defeasance, extinguishing the old one as to the time of making the award, and in point of legal effect operating exactly as if all the terms of the original condition to which it relates had been written over again, substituting only the 1st *March* for the 1st *February*, as the time within which the award should be made. With respect to the first point, in *Co. Lit.* 237 a. it is said, "that rents, annuities, conditions, warranties, and such like, that be inheritances executory, may be defeated by defeazance made either at the time, or any time after. So the law is of statutes, recognizances, obligations, and other things executory." A distinction is here taken, therefore, between things executory and things vested, as for instance, if an estate be conveyed with a defeazance, to make it void, the defeazance should be made at the time of the conveyance, but in case of an obligation, with a condition, which is only executory, the defeazance may be made at the same or at any future time. In *Roll. Abr.* 590, D. 45, and in *Vin. Abr.* tit. *Defeazance*, [D.] 2, it is laid down, that if a defeazance of a statute is made, and after that, another defeazance be made, the first thereby becomes void, and the

second only is in force. In *Holford* v. *Andrews* (*a*), it is stated to have been agreed by the Court in *Easter*, 8 *Jac.* 1, that a new defeazance may be made to an obligation with condition, but then it must be in writing. So, in *Hodges* v. *Smith* (*b*), it was determined in an action of debt on bond, that a defeazance by indenture made subsequent to the bond to which it related, might be pleaded in bar. In the case of *Pardons* (*c*), this case is stated, "*A.* was bound in a statute of 20*l.* to *B.*; *B.* sued execution, and the land of *A.* was now delivered to *B.* in execution, till he should have levied the 20*l.* and afterwards *B.* made a defeazance to *A.* by indenture, that if *A.* paid him 8*l.* at a certain day, then the recognizance, viz. the statute for 20*l.* should be void, and it was adjudged, that although the statute was executed, yet the defeazance of the statute was sufficient in law to defeat as well the statute, as the execution upon it; for the statute is the foundation of the whole, and therefore if that is defeated, all that is built upon it shall be defeated also." It is also laid down in *Shepherd's Touchstone*, 398, that, "if one make a lease for life by deed, and afterwards by another deed, grant to his lessee, that he shall not be impeached for waste, this is a good discharge; and if the lessee afterwards grant by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make, use, nor take advantage of the deed of discharge, this is a good defeazance of the discharge; so that hereby it seems that a defeazance may be of a defeazance, and one defeazance after another, and regularly the last shall stand." [*Bayley*, J. There is no doubt one deed may control another.] These therefore are authorities completely shewing that one condition may be defeated by another substituted in lieu of it, and when this is effected by an instrument of as high a nature, the first condition becomes void, and the second only shall stand. If this be fully established as a rule of law, then, secondly, it follows that the indorsement upon the bond in question is to operate as the condition of the bond,

(*a*) Moor, 573. (*b*) Cro. Eliz. 623. (*c*) 5 Rep. 13.

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and is in legal effect the same as if all the conditions of the bond had been written over again upon the back of it, although the only alteration is the substitution of a different time within which the award shall be made. As to this, the case of *Evans* v. *Thompson* (a), is expressly in point. In that case the parties, by indorsement in general terms, on the bonds for submission to arbitration, agreed, that the time for making the award should be enlarged; and Lord *Ellenborough*, C. J. expressed the opinion of the Court to be, "that such agreement to enlarge the time for making the award, must be understood as by reference, virtually incorporating in itself all the antecedent agreements between the parties relative to that subject, as if the same had been formally set forth and repeated therein, and of course incorporating amongst the rest the agreement contained in the condition of the bond, that the submission to arbitration should be made a rule of Court, and that with reference to the enlarged time instead of the time originally specified in the condition of the bond." There is no distinction between that case and this, and consequently the indorsement upon this bond incorporated all the agreements in the bond, subject to a new defeazance as to the time within which the award should be made. The award having been made within the time so specified, and not having been performed, the bond consequently becomes forfeited. If it be said that this form of action is not maintainable, and that the plaintiff must seek her remedy in an action of covenant, the defendant would become liable to an extent not originally contemplated by the parties. If this memorandum does not incorporate all the conditions and agreements between the parties in the original bond, then it must be construed as an agreement by which the parties bind themselves to whatever extent the award shall go. This defendant, who is a mere surety, could only be liable to the extent of 1000*l.* the penalty of the bond, but if he is to be liable upon the implied covenant, he might be answerable to the amount of

(a) 5 East, 189.

10,000*l.* if the arbitrators should think fit to make an award for such a sum; but it would be a hardship upon the defendant if this rough memorandum, upon the back of the deed, should be held to do any thing more than incorporate the agreements contained in the original bond. It must therefore have been the intention of the parties that the bond should continue in force, subject to the new defeazance indorsed upon it, as to the time within which the award should be made. On these grounds this action is maintainable, and the plaintiff is entitled to judgment.

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*Carter*, in support of the demurrer. In this form of action the plaintiff has misconceived her remedy. The declaration assumes to rest upon the breach of the condition of the original bond, which has never in fact been broken; whereas her remedy, if any, should have been on the deed-poll, for not performing the award within the extended time. As to the cases which have been cited, they only go to shew that an agreement under seal may be varied by a subsequent instrument of the like nature, and the latter shall be operative; but they do not touch upon the question as to the form of action which may be maintained upon the substituted instrument. It may be distinctly admitted, that an agreement under seal, may be discharged or altered by an instrument of the same description; but in such cases the cause of action arises upon the subsequent, and not upon the original instrument. In the cases cited, the action arose upon the original instruments, and the question was, whether the defendant could shew any thing by which the original instrument was discharged; but nothing was said as to what rights the parties had, arising out of the new defeazance. That was the case in *Hodges* v. *Smith*. In that, there was a deed of covenant which operated to prevent the party from suing on the original bond, and the Court rightly decided that the deed of covenant had that effect. It is not incumbent on the defendant to shew that the

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plaintiff has no remedy against him; it is sufficient for the present argument to establish that this is not the proper remedy. This bond is not capable of being forfeited by any thing done with relation to the deed-poll. It may be conceded that an action might be maintained upon the deed-poll, for not performing the award, if made within the extended time; but it does not follow that an action would be maintainable on the bond. The bond has never yet been forfeited, because it was made subject to a condition which has not been broken, and consequently the penalty has never become a *debt* for which the defendant is liable. The case of *Brown* v. *Goodman* (*a*) is directly in point, although it is stated by *Gibbs*, C. J. in *Thompson* v. *Brown* (*b*), that the ground of that decision was, that the consent to enlarge the time for making the award, was by parol. There Lord *Kenyon* took this distinction, that although the plaintiff might have some remedy, he had not any remedy upon the bond by which the defendant bound himself, under a penalty, to abide by an award, if made within a given time. This is not a substituted bond capable of being forfeited by any thing done with relation to the deed-poll. When an alteration is made in the terms of the condition, the right of bringing the action upon the original bond is forfeited. Here are two contracts under seal, first, the bond, and then the deed-poll. The penalties of the bond never could extend to an award made under a new agreement, which varies the time within which the award should be made. Suppose an action brought upon the bond, and the defendant, after setting out the condition on oyer, pleaded that no award was made, it is clear that the plaintiff could not reply that the time for making the award was enlarged by the deed-poll, and that the award was made within that enlarged time; because that would have been a departure. This, therefore, is the plaintiff's difficulty, because in pleading she undertakes to shew that the defendant is within the strict letter of the original bond. But this bond has been altered

(*a*) 3 T. R. 592, n. (*b*) 7 Taunt. 656.

by something else, which does not shew that the bond has been forfeited. The case of *Evans* v. *Thompson* does not conclude this, because that was decided upon a motion for an attachment. It had nothing to do as to the form of action to which the plaintiff must have resorted, had he sought such a remedy. On these grounds the defendant is at least not liable in this form of action.

*Bayly*, in reply, was stopped by the Court.

BAYLEY, J.—When first this case was presented to my consideration, I was not so satisfied with the form of the record as I have been by the argument and the cases cited by Mr. *Bayly*; and on that ground it was I suggested the propriety of introducing an amendment into the declaration, which I still think might have been introduced with advantage. But looking at the declaration as it stands, and referring to the authorities quoted, I am satisfied the plaintiff is entitled to recover. This is an action in substance upon the bond, and unless the plaintiff can recover upon it, she cannot recover at all. The bond was originally conditioned for the performance of an award to be made on or before the 1st of *February*. No award was made within that time, but before the 1st of *February*, and while the bond continued to be in force, there was an agreement by deed, signed and sealed by each and every of the parties who had been named in the bond, by which they gave to the arbitrators further time, until the 1st of *March*, for making their award of and concerning the several matters referred to them by the bond. The question is, what is the legal effect of that second deed? Is the legal effect of it merely to give a remedy upon that second deed itself, or is it in substance, to vary the day specified in the condition of the bond as it originally stood, and to introduce in substance and legal effect, into the condition of the bond, the extended period of time for making the award? The words certainly

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import, as far as we can collect the intention of the parties, that the plaintiff and all the other parties, were to be put exactly in the same situation as if the 1st of *March* had been originally introduced into the condition for the first time, as the period within which the arbitrators were to make their award. The authorities cited in argument by Mr. *Bayly*, shew most clearly that deeds or defeazances may be altered or varied, by instruments of the like nature. This was originally a bond with a defeazance of a specific import. The effect of the subsequent instrument is to introduce a variation into the terms of that defeazance, and the question is, whether that variation destroys altogether the bond to which the defeazance was attached, and substitutes a totally new and independent agreement of reference, or continues the bond, subject to the variation which the second deed introduces into the defeazance? I am satisfied that it was the intention of the parties it should have the latter effect, and to leave the bond subsisting, subject to the variation of the defeazance only, if by law it can have that effect. The defendant in this case, as far as I can collect from the bond and the award, was only a surety; for I observe by the condition of the bond, that the arbitrator on one side is to be named by *Redman* and *Moth*, and the arbitrator on the other, by the plaintiff. Now I cannot collect that the right of nomination could be exercised by two parties, unless the question in difference had originated between those two; and the award proceeds on that notion. I know of no legal principle which says, that a second deed may not be construed in its operation to limit the extent of a preceding defeazance, leaving the obligatory part of the bond itself unchanged. The case of *Brown* v. *Goodman* does not militate against the idea, that the second instrument, if it varies the defeazance only, may not be confined to that operation. In that case the declaration stated, generally, that the time for making the award had been enlarged by agreement. Now it is not every

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species of agreement which will continue the remedy on the bond; for though it may be agreed to enlarge the time for making the award, yet unless the agreement is by deed, it cannot continue the operation or vary the effect of the preceding deed. What a party states, in pleading, is to be taken most strongly against himself, and if only one species of consent will do, and in his declaration the plaintiff does not shew that it is that species, but states generally that it was a consent, it is to be taken against him, that it was not that sort of consent which would have the effect of continuing the operation of the preceding deed. In other words, if a consent by deed is the only mode by which a party can continue the obligation of the bond, unless he alleges that it was such a consent, he must fail. The case of *Brown* v. *Goodman*, therefore, could not be decided in any other way than it was, because there the plaintiff had only alleged generally that there was a consent, That might have been a parol consent, and though such a consent might give a remedy for the breach of a parol contract, yet it would give no remedy on the bond. The present is the case of an enlargement of the time by deed, and I think the case of *Evans* v. *Thompson* is an extremely strong authority, and an authority in point upon the subject. In that case there had been an agreement by bond to submit to arbitration. The submission was to be made a rule of Court. After that there was an indorsement upon the bond, by which the parties consented that the time for making the award should be enlarged. Nothing was said in that indorsement about the submission being made a rule of Court, but simply that the time should be enlarged. The award was made within the enlarged time, but not within the time mentioned in the condition of the bond. There was an application to make the first submission, and also the indorsement rules of Court. Then followed a motion on the part of the defendant, to confine the rule of Court to the first submission; and if he had succeeded, all remedy by attachment would have been taken away from the plaintiff,

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because the defendant could not have been guilty of any contempt under the original submission; but the Court held, that the indorsement by deed had the legal effect of virtually incorporating and specially repeating every thing said in the original bond of submission. The only difference between that case and this is, that there the Court were of opinion, that the enlargement being made in general terms, virtually incorporated all the other terms into the enlargement, and gave the party a remedy by attachment, for which there had been no express stipulation. Here it is clear that the deed poll incorporates in it all the terms of the original condition, and gives a remedy upon the bond. I can hardly see with what view this defendant should have signed the deed for enlarging the time for making the award, except for the purpose of continuing his obligation for the penalty of the bond. If that had not been the intention of the parties, why did they frame their agreement in these terms? It would have been easy for them to enter into a new agreement by deed, and to have framed their submission in another manner. I can see no reason for the distinction taken in argument. I can only understand that the effect of the enlargement by deed was to continue the bond with its original penalty, varying it only as to time, and giving the remedy which the plaintiff was entitled to upon the obligation. For these reasons I am satisfied, that the plaintiff is entitled to sue upon this bond, and that the present action is maintainable, and consequently the demurrer must be over-ruled.

HOLROYD, J.—I am of opinion, that this action is maintainable on the bond, under the circumstances stated in the declaration. The bond was originally conditioned for the performance of an award, if made within a given time. Previous to the expiration of that time, another agreement under hand and seal was entered into, whereby the parties gave and granted unto the arbitrators further time for making their award. The effect of that was not merely an agreement to abide by the award, which should be made within

that specific time, but I think it operated as a variation of the original condition of the bond, and that it must be taken to have been so intended from its import. From the cases cited in argument, there is no doubt that a former deed may be altered by a subsequent deed, and that the same rule applies to defeazances. This appears clear from *Co. Lit.* 237 a, and *Shepherd's Touchstone*, 398. The first of these authorities shews, that an obligation may be defeated by a defeazance made either at the time when the obligation is executed, or at any time after; and the second establishes, that where several defeazances are made at different times, the last shall stand. There is a distinction between a matter that has been executed, as in the case of a feoffment of land, and a matter which is merely executory, as in the case of a bond. In the one, the estate is vested in the feoffee, and therefore a subsequent condition is void, and in the other the condition may be defeated by an instrument of as high a nature, although not executed at the same time with the bond. Therefore, if there is originally one defeazance in a bond, and another is afterwards made, the original defeazance becomes void, and the second stands, not merely as a matter of agreement, but as a defeazance, which is to operate instead of the former defeazance. This has been clearly established, with reference to bonds. In this case the original defeazance was for the performance of the award, to be made within a limited day. The subsequent agreement is only to give a further time, in addition to that which was mentioned in the original defeazance, which by law might be done. Now if that is to be considered as matter not merely of fresh agreement, but as varying, and intending to vary the condition, as I think it is, then the bond, though originally conditioned for the performance of an award to be made before the 1st *February*, yet became of necessity subject to a defeazance, applicable to an award to be made on or before the 1st *March*; for as a defeazance may be made at a subsequent time, or

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one defeazance may be altered by another, or substituted for another, by an instrument of as high a nature, it follows, that where the terms of a defeazance are so altered, the alteration may be considered as a substitution for the corresponding part in the original defeazance. Suppose the indorsement on this instrument had not referred at all to the former defeazance, but had stated that the bond was to be void, upon the performance of an award by the same arbitrators, within the extended time, there is no doubt, according to *Shepherd's Touchstone*, that the subsequent would be the condition, and not the former. I think the indorsement upon the deed, clearly shews, that the parties merely intended to substitute one condition for the other, and to say that this should be the condition on which the bond should be void, instead of the former. I likewise find it said in a case from *Carthew*, referred to by Lord Chief Baron *Comyn*, in his *Digest*, tit. *Defeazance* (B. 2.), that an obligation may be defeated by a defeazance, after the condition broken, as well as before. So that as far as we can judge, if the condition had been broken, there might still be a defeazance operating upon the bond, though forfeited. The case of *Brown* v. *Goodman* was, I think, rightly decided, because it did not appear, that the consent to enlarge the time was by deed; and therefore, if the consent was not by deed, but by parol only, or that which the law considered parol, it would not in its legal effect, vary the condition of the bond. In that respect that case is distinguishable from this, because here the alteration of the time was by an instrument of as high a nature as the bond, and consequently is to be considered as a substituted defeazance. For these reasons I am of opinion that the plaintiff is entitled to judgment.

Best, J.—I am of the same opinion. The facts disclosed on this record are shortly these:—The defendant by the bond, which he executed, binds himself to stand to and abide by the award to be made by certain arbitrators,

provided their award should be made before the 1st *February*. It was found inconvenient or impracticable for the arbitrators to make their award within that time, and therefore the plaintiff and defendant agreed, by deed, to enlarge the time to the 1st *March*, within which time the award is in fact made, and the condition having been broken, the question is whether this action is maintainable. It is admitted by Mr. *Carter*, that some species of action might be maintained by the plaintiff, but he insists that she cannot support the present, which is an action of debt. He says, that if an action can be maintained at all, it must be founded upon the last instrument, and not upon the original bond, or upon both united. I am, however, of opinion, that the plaintiff may maintain her action upon the original bond, notwithstanding the defeazance has been altered; and I think so on this plain well known principle of law applicable to bonds, namely, that the plaintiff, the obligee, does not avail herself of the defeazance. The defeazance is only to restrain her right, and to give a defence to the action under certain circumstances. The bond remains unaltered, although the defeazance has been altered. The alteration of the defeazance is only to impose a restriction upon the plaintiff's right; but her right to the penal part of the bond remains the same in full force. It appears to me, therefore, according to the first principle of law applicable to bonds, that this action is properly brought. The bond stands on its original principle, the defeazance being only for the purpose of restraining the plaintiff as to the time within which she shall assert her right. That principle is perfectly clear, without the assistance of any cases; but it appears to me, that the authorities referred to by Mr. *Bayly* are decisive. I allude particularly to the case of *Holford* v. *Andrews* (*a*), in which it is stated to have been agreed by the Court, that a new defeazance may be made to an obligation, with condition, but then it must be by writing. A new defeazance made to a condition, does not affect the original obligation,

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(*a*) Moor, 473.

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The obligation continues the same, and the only difference is, that the new defeazance operates instead of the old. It is impossible the Court in that case could hold this language without being of opinion that such an alteration in the defeazance could have no effect upon the obligation of the bond. The meaning of that is, that the party may sue upon the old instrument, but his right to sue is controlled by the new defeazance. In *Rol. Abr.* 590, D. 45, it is said, that if a defeazance of a statute be made, and after another defeazance is made, the first defeazance is void thereby, and the second only is in force. That means a defeazance to the first bond, and not a new separate independent deed, but merely an instrument controlling the old one. It leaves the bond as it was, and the right of the party to sue upon it remains still in full force, because the defeazance only operates with reference to the time when the right can be asserted. I only point out this distinction as an answer to the argument urged on the part of the defendant. There is nothing in the new defeazance which gives the plaintiff a new right, because her right is founded upon the old instrument; the defeazance being only a restraint imposed upon that right. In that point of view, therefore, the second defeazance is a mere substitution for the first, and the case of *Hodges* v. *Smith* is expressly in point upon this part of the case. That case shews, that where an indorsement is made for enlarging the time, it must be construed as adopting all the terms of the former instrument, pending the arbitration, precisely the same as if all those terms were again repeated. Then it is said, that the plaintiff has no right to sue here, because there is no money awarded to her. The plaintiff is not suing upon the award of the arbitrators, but upon the bond, and she says, "I have a right to have the 1000*l.* penalty secured to me for the performance of the award." To whom that money is ultimately to be paid, makes no difference to the defendant. If the plaintiff had sued upon the award, then the objection would have been more specious, but the plaintiff sues for the penalty which

the defendant expressly stipulates shall be paid to her, in consequence of non-performance of the award. I am therefore of opinion, that there is no foundation for the objection raised by this special demurrer.

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Judgment for the plaintiff.

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*Ex parte* JOHN SMITH.

*Thursday, Nov. 6.*

A conviction on 45 *Geo.* 3. c. 121. s. 7. for carrying and conveying foreign brandy in half-ankers, alleged to be "*then and there liable to forfeiture*, the said offence being committed against the provisions of the acts for the prevention of smuggling," is insufficient, in not shewing the particular grounds of forfeiture.

CONVICTION on the 45 *Geo.* 3. c. 121. s. 7. for carrying and conveying foreign spirits. The conviction, being returned into this Court by certiorari, stated, that on, &c. at *Dover*, &c. *John Smith* had been duly convicted before *J. S.* &c. of having on, &c. at, &c. (he the said *J. S.* then and now being a subject of his present Majesty, and being a seaman or seafaring man) been found carrying and conveying, and assisting in the carrying away and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, seven gallons of foreign brandy, in two casks, called "half-ankers," then and there subject and liable to forfeiture, the said offence being by him the said *J. S.* committed, against the provisions of the acts of parliament made and passed *for the prevention of smuggling*, which offence had been duly proved before the Justices on the oath of one credible witness; concluding with judgment, that the said *J. S.* had, for such offence, forfeited the sum of 100*l.* pursuant to the 3 *Geo.* 4. c. 110, &c.

*Platt* moved to quash the conviction for insufficiency, in not describing any offence for which the defendant was liable to punishment. The statute on which the conviction is founded, makes it an offence for any person to be found carrying, &c. any foreign brandy, &c. "subject to forfeiture under that act, or any law or act relating to the revenue of customs or excise." The offence described on the face of

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the conviction is, the carrying and conveying a quantity of brandy "liable to forfeiture;" but it does not state any ground of forfeiture, nor does it refer to any law or statute by which, under the circumstances described, it would be forfeitable. It is quite consistent with this conviction that the carrying and conveying alleged was an innocent act, or, at all events, that it was not punishable under any act relating to smuggling. The conviction therefore is bad; first, for not shewing that the carriage and conveyance stated was against the form of some specified statute relating to smuggling; and, second, in not shewing that the brandy itself was liable to forfeiture by any statute relating to the revenue of customs or excise.

*Copley*, S. G., contrà. It is quite clear that if the conviction had said, that the brandy was liable to forfeiture "under the acts relating to the revenue of customs and excise," it would be free from objection. The question then is, whether the conviction in its present form is not equivalent to that statement. The description of the offence is in having been found carrying and conveying "seven gallons of brandy in two casks, called 'half-ankers,' then and there subject and liable to forfeiture, the said offence being by him committed against the provisions of the acts of parliament made and passed *for the prevention of smuggling*." That statement is equivalent to "acts relating to the revenue of customs and excise." The brandy must be liable to forfeiture under some act relating to the revenue of customs or excise. It is so stated to be; for the offence is said to be committed against the acts for the prevention of smuggling, and consequently against the acts relating to the revenue of customs or excise. But the statement of the fact that the brandy was carried and conveyed in half-ankers, clearly shews that it was liable to forfeiture under the statutes for the prevention of smuggling; and it is quite unnecessary to specify under what particular statute it was forfeitable.

ABBOTT, C. J.—I am of opinion that this conviction is bad in form, and must be quashed. The general rule as to convictions is, that the specific fact which forms the ground of forfeiture should be stated, in order that the Court may see that the penalty has been properly imposed, and be quite sure that the convicting Justice has not mistaken the law. If the conviction had stated the circumstances under which the brandy was imported, that it was imported in a certain manner, in casks of a certain size, which was contrary to law, we should then know that the carriage of it on land in such casks would render it liable to forfeiture; but carrying and conveying brandy on land may render it liable to forfeiture for various reasons, and therefore it was necessary to shew on the face of this conviction why the brandy in question was forfeitable.* It is stated certainly as a fact, that the brandy was contained in two casks, called "half-ankers;" but it is not said how it was imported,—that it was imported in those casks. It might have been imported in casks of an hundred gallons, and, having paid the duty, found its way into half-ankers. No fact is given, which plainly imports that the brandy was liable to forfeiture. The general rule I have mentioned is a sound one, and ought not to be departed from.

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BAYLEY, J., concurred.

HOLROYD, J.—The general rule referred to by my Lord Chief Justice is equally applicable to convictions on the Game Laws. It is not sufficient in such cases to state, that the party was not qualified by the laws of the realm to do so and so, though the very words of the act of parliament are pursued, but it must appear whether the convicting Justice has drawn the right conclusion from the facts, by negativing all the circumstances which are necessary to constitute a qualification. In convictions on the Excise or Custom Laws, if the particular facts and grounds of forfeiture are stated, it is not necessary to name the statute by which the

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penalty is given, but merely to state that the offence is contrary to the statute in that case made and provided, and the Court will then see whether the Justice has drawn the right conclusion. Now here no sufficient facts are stated to support the conviction (*a*).

Conviction quashed (*b*).

(*a*) *Best*, J., was absent.
(*b*) See 3 *Geo.* 4. c. 110. in which a form of conviction is given.

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*Saturday, Nov.* 8.

The KING *v.* D. W. HARVEY, Esq. and J. CHAPMAN.

On an information for falsely and maliciously publishing a libel concerning the king, by giving it out that his Majesty was afflicted with mental derangement, and a verdict of guilty having passed against the defendants, it was resolved, 1. That to assert falsely of his Majesty, or of any individual, that he labours under the affliction of mental derangement, is a criminal act, and a malicious intention may be inferred from the mere fact of publication, unless evidence is given by the defendant to rebut such inference; 2. That such an assertion concerning the king, being in itself mischievous to the public, is an indictable offence without any allegation, or direct proof of a malicious intention; 3. That where the Jury desired to know "whether, in order to convict a defendant for the publication of a libel, a *malicious intention* must not have existed in his mind;" they were correctly answered by the Judge, who told them, that "a person who publishes that which is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of proving the contrary lies upon him;" and 4. That where the publisher of a libel states that the fact which he communicates is "*from authority*," and it turns out that the fact is untrue, he is guilty of a *false* assertion, in the criminal sense of the word.

INFORMATION filed by his Majesty's Attorney-General, against the defendants, for an alleged libel on the king, contained in a newspaper called *The Sunday Times*, of which the first-named defendant was the proprietor, and the other the printer and publisher. The information charged in substance, that the defendants maliciously intending to bring his Majesty into contempt, by giving out that he was afflicted with mental derangement, published the false, scandalous, and malicious matter set out. The libel formed the leading article in the paper, and was headed "Latest Intelligence. The King." It commenced in the following words:—"Attached, as we sincerely and loyally are, to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern that we have to state, that the malady under which his Majesty

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labours is of an *alarming* description. It is from authority we speak, when, with sorrow, we inform our readers (as we think it our duty to do), that the king not only still continues to be confined to his chamber, but that the symptoms of his disorder are of too serious a nature to admit of his medical attendants being able to say when their royal patient will be sufficiently recovered to show himself to his anxious and afflicted subjects. Dr. *Knighton*, his Majesty's private secretary and domestic physician, is in constant attendance, scarcely ever out of the chamber in which the king is confined, and never farther from the scene of sickness than the adjoining room. The persons about his Majesty foreseeing, that too probably, it will be a considerable time before the *seat* of his complaint will be in a state sufficiently convalescent to render it advisable that he should quit the Pavilion, have, in order to ease the apprehensions of the public, circulated the report, that pleasure and comfort, not any afflicting necessity, will induce a protracted stay at *Brighton*. But, far from approving this deceptious kind of policy, which only ensures a more violent shock, whenever the real truth of the case shall appear, we deem it much the wiser way to use, on such unhappy occasions, the language of fact and reality; therefore we are as desirous of communicating, as others are of concealing, the melancholy truth, that the king's disorder is, it is feared, of an *hereditary* description."—The libel contained other matter not necessary to state. The defendants pleaded Not Guilty. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Trinity* Term, the evidence given of property in and publication of the paper was, that required by 38 *Geo.* 3. c. 78. On the part of the defendants it was admitted by counsel, that the libellous matter set out, was calculated to impress a belief that his Majesty was afflicted with mental derangement, and that that suggestion was utterly false *in fact*; but it was contended, in argument before the Jury, that although there was no foundation for the statement in point of fact, yet inasmuch as the defend-

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ants themselves had, at the time of publication, believed the fact to be true, in consequence of prevalent rumours afloat, and circulated by other journalists, respecting the king's health, it was to be considered as a bonâ fide publication, and therefore that the defendants could not be convicted of having *maliciously* published that which was false. The Lord Chief Justice, after stating the charge contained in the information, and comparing it with the libellous matter set out, told the jury, "that to assert *falsely* of his Majesty, or any individual, that he labours under the affliction of mental derangement, is clearly a criminal act. It is a criminal act to assert that falsely of a private individual, but not so aggravated an offence as to assert it of the king, considering the circumstance of his high station in the country, and the dangerous consequence which might result from such a statement. The information charges this publication to be false. It is distinctly admitted by the defendants' counsel, that the statement in the libel is false in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not found himself upon existing rumours; he goes beyond mere assertion; he professes to speak "*from authority*," and heads the article by the words "Latest intelligence.—The King." Inasmuch, therefore, as it is now unequivocally admitted that the fact did not exist, and was utterly without foundation, there could be no authority for the statement. It has been usual for Judges, since the statute, to state to the Jury their opinion whether the publication be or be not a libel. That has been my habit, and I tell you therefore, that in my opinion this is a libel, calculated to vilify and scandalize his Majesty, and to bring him into contempt among his subjects. But I tell you at the same time, that you have a right to exercise your own judgment upon the whole matter in issue; and I invite you so to do, and I request that your verdict may be the result of your own conscientious judgment." The Jury retired, and, after deliberating upon their verdict for about

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two hours, returned into court, and, by their foreman, said to the Lord Chief Justice, "We wish to ask your Lordship whether, in order to convict a defendant for the publication of a libel, a *malicious intention* must not have existed in his mind?" The Lord Chief Justice, in reply to this question, said, "A person who publishes that, which is calumnious, concerning the character of another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and the onus of proving the contrary lies upon him. There may be, as you know, an innocent publication of that, which, in its own nature, is injurious to another, as, for instance, delivering to a magistrate a book containing libellous matter, or other acts of that kind. The general rule of law is, that it is to be presumed, that a person intends to do that, which the act that he does is necessarily and obviously calculated to effect, unless he can shew the contrary." The Jury retired again for about three hours, and then found both defendants guilty, but recommended them to mercy.

*Denman*, C. S. and *Brougham*, for the defendants respectively, now moved for a new trial, on the ground of misdirection on the part of the Lord Chief Justice, both in his original charge to the Jury, and in his answer to the question put by them on their return into Court. The objection, they said, resolved itself into three points; first, As to the use of the word "*falsely*," in his Lordship's charge; second, In not answering precisely and distinctly the question put by the Jury on their return into Court; and, third, In answering the question of the Jury, in such a manner, as to mislead their judgment upon the point on which they desired information. As to the first point, the Lord Chief Justice laid it down, "that to assert *falsely* of his Majesty, or of any other person, that he laboured under the affliction of mental derangement, is a criminal act." Now, this is too broad and unqualified a proposition. Undoubt-

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edly, at the trial, it was not intended, on the part of the defendants, to dispute the falsehood of the statement, in point of fact; it was admitted to be false, but it was contended, that although there was no foundation for it, yet when the fact was stated in consequence of rumours which had obtained circulation, and which the defendants believed to be true, they might publish it, if done fairly and bonâ fide. The publication of such a statement, under such circumstances, though the fact be not strictly true, is not a criminal act, unless it is published with a malicious intention. If the defendants believed the fact from the rumours which were in circulation, the publication of it would not be criminal, unless they had a malicious motive in their minds. The mere circumstance of publishing a false fact, however seriously it may affect an individual, may be an innocent act. Malice is the very gist of the offence of libel. If a statement be made bonâ fide, though it turns out not to be true, yet it is protected, and the publisher is not punishable. The learned Judge's proposition was therefore too broad. It should have been qualified with the supposition that there was a malicious intention on the part of the person who so made the assertion. Supposing, therefore, that there were no objection to the subsequent part of the proceeding, the first direction of the learned Judge was too general in laying it down that the mere assertion of a false fact, is a criminal act, independently of any *intention* on the part of him who made it. Many instances might be put in which so broad a proposition would be found incorrect. One is the case of a master giving an untrue character of a servant, in which instance the assertion must not only be false, but also malicious, to render it criminal. From the manner in which this case was left to the Jury, it seemed to be assumed that the defendants' counsel had admitted not only that the fact was false, but that the defendants knew it to be false at the time they asserted it. Now, the admission certainly did not go to that extent. On the contrary, it was expressly stated, that although the falsehood of the fact could not be then

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denied, yet that the defendants did not know it to be so, at the time of publication. If the word "false," as used by the Lord Chief Justice, means, knowingly and wilfully false, then there is an end of the objection; but the objection is, that the Jury were left to consider this as the statement of a false fact, previously and maliciously coming from the defendants themselves (*a*). The case of *Haycraft* v. *Creasy* (*b*), is an authority to shew how far a man may be allowed to state a thing as of his own knowledge which is not true, and yet not be liable for the consequences. There a person in trade made inquiry of the defendant respecting the credit of another, and the answer was, "I can positively assure you of my own knowledge, that you may credit her to any amount with perfect safety." It was not denied that this was all untrue, it was not even pretended that the defendant really knew that what he had said was true of his own knowledge; yet the Court held that this assertion of *knowledge* meant no other than a strong belief, founded upon what appeared to him to be reasonable and certain grounds, and that he really had not wilfully, fraudulently, and deceitfully made the representation. If that interpretation of the word "knowledge," be correct in a civil action, how much more so is it in a criminal proceeding? The wilful and known falsehood of the statement constitutes the gist of the offence of libel, and therefore it was material to point out to the Jury the distinction between knowingly and maliciously stating that which was untrue, and only stating that which was in point of fact untrue and incorrect. [*Best*, J. In the case of *Haycraft* v. *Creasy*, fraud was the very gist of the action, and therefore it was necessary to shew, not only that the statement was untrue, but that it was made malo animo. Here it is to be observed that the defendants profess to state the fact "from authority."] That circumstance makes no difference, because, if they were misled by false rumours, and had, upon the authority of those

(*a*) *Rex* v. *The Dean of St. Asaph*, 21 Howell's St. Tr. 847.

(*b*) 2 East, 92.

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rumours, stated a false fact, they would still be justified unless they published it with wilful knowledge of its falsehood. These words must be taken to mean in common parlance, that the defendants were told by some person whom they had reason to believe, that the fact was so. Then, secondly, the question put by the Jury upon their return, was not answered as it ought to have been. The Jury said "We wish to ask whether, in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind?" That was a naked proposition of law, and ought to have been distinctly answered. It was evident from this question, what was the state of mind of the Jury upon the subject, and that they required the assistance of the Court. At first they had been told in the abstract, that to assert falsely that the king was afflicted with mental insanity, was a criminal act; and they wished to be informed whether, though the defendants had made a groundless assertion, yet there must not have been a malicious intention influencing their conduct, in order to render them criminally liable. Now this question was not distinctly answered. An answer, "yes" or "no," would have been sufficient, and no objection could have been taken to it; but they were not told one way or the other whether a malicious intention was or was not necessary to constitute a libel. The Jury had a right to have that question in the first place distinctly answered as a question of law, however the answer might afterwards have been modified. The answer in the terms given, was calculated to mislead the Jury. They might have been induced to think that it was wholly immaterial whether the intention was malicious or innocent. Their verdict might have been founded upon the circumstance of the assertion being untrue, although they might have thought from facts within their own knowledge, and from the terms of the publication itself, that the defendants had only repeated that which had been publicly rumoured, believing it to be true at the time when they published it. Assuming that the answer given by the learn-

ed Judge was correct, "that malice is to be inferred from the mere fact of publication," still there is great inconvenience in laying down that to the Jury as a presumption of law, which is only one of the circumstances in the case, from which they would be warranted in drawing a conclusion of fact. A more precise question of fact, or one more fit for the consideration of the Jury, cannot be imagined than the question of malicious intention. The question of malice is in all cases a question of fact for the Jury, to be drawn from the circumstances to be laid before them in evidence; however strong the tendency of the particular publication may be, they are not told to form any presumption in the case, but merely to consider the tendency of the libel, and all the other circumstances by which the prosecutors make out their case. [*Bayley*, J. Are you right in considering that malice is a mere question of fact? I take it that where a particular consequence will necessarily result from a particular act, the law says, that the party doing the act, is primâ facie to be considered as intending that which is the necessary consequence of the act. For instance, in *Rex* v. *Farrington*, *Mich.* 1811 (*a*), there was an indictment against the prisoner for setting fire to a mill, with intent to injure the occupier thereof. The indictment was not preferred until eighteen months after the offence was committed, so that it could not be supported on the 9 *Geo.* 3. c. 29. The prisoner was of weak intellects, but not entitled to an acquittal for want of reason. There was a point reserved, whether under 43 *Geo.* 3. c. 58, it was not necessary to give some evidence of an intent to injure beyond the mere act of setting on fire; but the Judges were unanimously of opinion, that the prisoner must be taken to have intended that which was the necessary consequence of his act, and the conviction was held right.] The law in that case is not disputable; but the question here is, whether it was properly left to the Jury that they must presume a malicious intention. [*Abbott*, C. J. Did I say *must*?] The case was

(*a*) 2 Russell Crim. Law, 1675.

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certainly summed up with all proper remarks upon the evidence, but they were not correctly directed upon the question of malice. The case mentioned by the Court is inapplicable to this, because there the question was, whether it was necessary for the prosecutor to give complete proof of malice. [*Bayley*, J. If I am not mistaken, the Judge who tried that case told the Jury that the prisoner must be considered as intending to do that which was the necessary consequence of his own act.] The whole doctrine of presumption, is the doctrine of common sense—that to which the common sense of the Jury is to be applied. It is clear that in this case their common sense was not considered, because they were two hours deliberating whether this was a libel. When the Jury were told that they ought to presume malice from the fact of publication, they considered it a direction in law that they were bound to presume malice. [*Abbott*, C. J. The whole of my summing up must be taken together. *Bayley*, J. There is one familiar instance which is strongly applicable to this case, upon the question of intention; namely, the case of an indictment for uttering a bank note with intent to defraud the Governor and Company of the Bank of *England*. In ninety-nine instances out of one hundred, all that the utterer means to do is to defraud the particular person who gives him money for the forged note. He does not carry the note to the bank; but, inasmuch as the uttering of such a note has a natural tendency to defraud the bank, the Jury are told that they ought to infer the intent to be to defraud that party who would be injured if he were induced to pay it. That is a case which constantly occurs. This point was expressly decided in *Rex* v. *Mazagora*, in the year 1815 (*a*). There the indictment was for disposing of forged bank notes, the intent was charged to be to defraud the bank. The Jury found the prisoner guilty, but that the intent was to defraud any person who might take the notes; and that the intention of defrauding the bank in particular did not enter into

(*a*) See Bayley on Bills, 443.

the prisoner's contemplation. A case being reserved for the Judges, they thought the matter too clear for argument, and that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.] Still the question of intention is a question of fact for the Jury. In *Edridge* v. *Knott* (*a*), and *Doe* v. *Reed* (*b*), it was held, that the presumption of title to property from length of possession, is a question of fact for the Jury. Presumptions of law are not to govern the verdict of the Jury; they are to judge upon the facts; and malice being a question of fact, they are not to presume that it exists, unless the whole circumstances of the case warrant that conclusion. Then, thirdly, the learned Judge improperly directed the Jury in his answer to their specific question, by telling them that they must presume the intent, unless the defendants could shew the contrary, and that the onus lay upon them to *prove* the contrary. From this direction the Jury might naturally presume, that it was incumbent on the defendants to produce vivâ voce depositions and documentary evidence to rebut the presumption of malice; which it was not competent to them to do. All that was open to them to do was by argument and illustration, and comparison of the different parts of the libel to shew that they could have no malicious intention. If, therefore, the Jury had fallen into that mistake, and in consequence were induced to convict the defendants, although from facts within their own knowledge, and from the libel itself, they were of opinion that the publication was bonâ fide, and founded upon a belief that the facts there stated were true, then they were clearly misdirected, and the defendants are entitled to a new trial.

Bayley, J.—It does not appear to me, that there is any legal objection to the manner in which this case was presented by my Lord Chief Justice, to the Jury in the first instance; and in my judgment, the answer to the specific question put by the Jury, was perfectly correct. But I

(*a*) Cowp. 215. (*b*) 5 B. & A. 232.

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think, under the circumstances of the case, supposing it to have been a question of fact, whether the Jury could infer malice, the evidence on that point was all one way, and where there is evidence on one side, and nothing to rebut it on the other, it is the duty of the Jury to believe that evidence, and act upon it accordingly. This was an information for a libel, and we cannot form an accurate judgment of the propriety of the specific direction to the Jury, without seeing what the nature of the libel is. This libel contains not merely an assertion of fact, which the party may suppose to be true, and with reference to which he professes to have the ordinary means of knowledge; but it goes further and higher up; it is an assertion in such a way, as that if it be an honest, bonâ fide, and innocent assertion, the means of proof must lie within his own knowledge, and he must have the medium of proof, so as to lay the source of his information before a Jury. He does not merely state that the fact exists, but he says, "it is from *authority* we speak;" and then he makes the assertion which is the subject of the libel. It is conceded, that falsely to state that which this publication represents with reference to his Majesty, is a libel. If falsely stating that fact be not a libel, why then the objection will remain on the record, and the defendants will have the benefit of the judgment of a Court of Error, or of the opinion of this Court, if the question shall be presented on motion to arrest the judgment. But as at present advised, I am of opinion, that falsely to make that assertion was evidence in this case that the party made it maliciously. Mr. *Brougham* has taken a distinction between an *untrue* and a *false* assertion. I fully understand the difference between the one and the other, as it exists in his mind. If a man asserts a fact, believing bonâ fide that it exists, although it does not exist in reality, he is making an *untrue* assertion, and no criminality attaches to him; but if knowing that the fact is not true, or not having the means of knowing it, he takes upon himself to assert it without any foundation whatever, then he is to be

considered as making a *false* assertion in the sense and meaning in which Mr. *Brougham* construes the word, and his conduct becomes criminal. Supposing the distinction to be well founded, I am of opinion, that if in the one case the party asserts that which he knows not to be true, or, in the other, makes the assertion unwarrantably, because he does not know whether it be true or not, and takes upon himself to assert that it is so, then he makes a false assertion, or is guilty of a criminal untruth, if it is discovered that his assertion is unfounded. There are authorities to prove, that if a man will take upon himself to swear to a fact, not knowing whether the fact exists one way or the other, and it turns out that he is guilty of a falsehood, he is liable to a prosecution for perjury. Now is the assertion in this case to be considered false or not in the latter sense of the word? A person making such an assertion, may or may not have the means of knowing the state of his Majesty's health at the time; but here the writer takes upon himself to say, "we have *authority*" for stating what follows. Had he authority or had he not? If he had, then he had the means of laying proof of his authority before the Jury, and of shewing that although it was an untrue assertion, and had the character of untruth belonging to it, yet it had not the character of falsehood; but if he had no authority for the statement, then it was a false assertion in the criminal sense of the word. No proof was given that they had any authority whatever for the statement, and therefore the defendants were properly convicted of asserting a criminal falsehood. Then the next question is, whether the defendants are to be considered as having published the libel with a malicious intention. Whether a malicious intention is a necessary ingredient in all cases of libel, we need not discuss; but assuming that a malicious intention is necessary, I take it to have been established by many authorities, to two of which I have already referred, that a party must be considered, in point of law, as intending that which is the necessary or natural consequence of the act which he does.

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Now, if I malign a particular person, and defame his character, the presumption is, that I mean to do him an injury. My assertion of a falsehood, with reference to him, will naturally prejudice him in the eyes of all persons who hear or read that which is said by me of him. I say, therefore, it must be inferred, that the party intended that which is the natural consequence of his act. The cases I have already mentioned (which were criminal cases of the highest nature), seem to me to establish that as an undoubted proposition of law; and I think the case of *Rex* v. *Creevy* (*a*), is a strong authority to shew that the direction given by my Lord Chief Justice in answer to the question put by the Jury, was most correct and accurate. That was an indictment against the defendant for publishing a libel against a person named *Kirkpatrick*, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in parliament, but it was published by him, in print, as a correct report of his speech. The case was tried before Mr. Justice *Le Blanc*, a man of great accuracy, talent, firmness, and propriety. It was objected, at the trial, that there was no proof of malice, so as to make the publication libellous. The learned Judge was of opinion, that it was not necessary to prove malice, but that it might be inferred from the publication itself; and upon the authority of the case of *Rex* v. *Lord Abingdon* (*b*), he held that a member of parliament is answerable for publishing what he has delivered as his speech in parliament, if it contain defamatory matter; and that question he left to the Jury, stating to them that they were to look both to the matter and manner of the publication, in order to decide whether it was libellous or not. The defendant was found guilty, and there was afterwards an application made to the Court for a new trial, on the ground of misdirection. The rule was refused, and Lord *Ellenborough*, C. J. said, "the only question is, whether the occasion of the publication rebuts the inference of

(*a*) 1 M. & S. 273. (*b*) 1 Esp. N. P. C. 226.

malice arising from the matter of it;" and *Le Blanc*, J. stated, that he had told the Jury that they were to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them. He further stated to them, that where the publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances attending the publication, to rebut that inference. Now that case is expressly in point with this, and I cannot distinguish one from the other. In this case the publication was of a matter which, if false, it is now conceded was libellous. Well then, was malice properly to be inferred from it? The decision in that case is, that unless there is some excuse for the publication, the malice ought to be inferred. If so, then in this case there is no solid ground of complaint. Fault is found with my Lord Chief Justice's direction, in saying that the onus of negativing the malice was cast upon the defendants. It was cast upon them, and most justly, because when the natural tendency of the act itself is to shew that it was malicious, if a defendant is to exempt himself from the natural inference, he must do it by something on his own part to rebut such inference. Now in this case, it was within the power of the defendants to have adduced evidence to prove (if the fact was capable of proof), that they had *authority* for their statement. They were entitled to shew, by evidence, what was their authority, but in the absence of such evidence, I think the inference of malice was naturally and properly drawn from the publication itself. For these reasons I am of opinion that there is no foundation whatever for granting a new trial.

Holroyd, J.—I am also of opinion, that there is not sufficient ground for disturbing this verdict. This is an information for publishing a libellous paper, and of that description which I think is to be considered not only injurious to the individual to whom it relates, but mischievous to the public, as tending unquestionably to excite great

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apprehension and alarm in the minds of the people, as to the state of health in which this publication announces, as "from authority", the head of the government is. Now if a thing which in itself is mischievous to the public, be wrongfully done, that is an indictable offence, and is so without any allegation or direct proof, of a malicious intention. Wrongfully to do an act, without lawful excuse or other justification which is mischievous to the public, is of itself indictable. In some cases, indeed, malice is the very gist of the offence, as in murder; but in other cases, as in larceny, malice is not an ingredient. Where the mischief is done to the individual, malice is in many cases essential to be proved, but it is not to be understood that in all cases it is requisite. I only mention this to shew, that it is not essential, in the present case, either to aver or prove malice, because this was an act in itself mischievous to the public. But without relying on that circumstance, I am of opinion, that the evidence before the Jury was such, as that by the rules and principles of the common law, malice was to be inferred, and that the Jury, in the discharge of their duty, were bound to act upon those rules and principles, and apply the law to the facts before them. This is a publication which assumes a knowledge of the fact which it alleges; it assumes, that the writer had it from *authority*; and whatever may be the import of that word, if the defendants had any authority to justify, or excuse the publication, it ought to have been alleged and proved by them. Whether that would be a sufficient excuse for the publication, I will not take upon myself to determine; in this case it is not necessary I should; because in the absence of any proof of authority, the very act of publishing a statement which is mischievous to the public, is primâ facie evidence to shew, that it was done malo animo; and it appears to me, that when a publication having such an injurious tendency is proved, the principle of law is, that it is done with a malicious intention, because unless there is some proof to shew the contrary, it is

to be taken that the party intended those effects which naturally flow from his act. If then, the effects naturally flowing from the act of publishing the libellous matter in question, were mischievous to the public, I think the Judge was bound to tell the Jury that the law inferred malice, and the Jury were bound to adopt that principle in the application of their verdict, to the facts proved. When the fact of such a publication is established, I think the Judge was right in telling the Jury that malice was to be presumed, and that the intention of the defendant was that which the publication was naturally calculated to produce, and that the onus lay upon the defendant to rebut the inference. But it is said, that my Lord Chief Justice was bound distinctly to answer the abstract question put by the Jury. I am, however, of opinion, that a Judge is not bound to answer any abstract question, except so far as it is material to the question before him, and on which the Jury are to decide; and in this case, if the Jury were satisfied from the answer which was given, that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must, at the same time, have been satisfied that there was sufficient proof of malice. They appear to have been so satisfied, for they retired to consider further of their verdict, and acted upon the answer which they received. On that part of the case, therefore, there can be no ground for a new trial. I also think that my Lord's direction was perfectly correct in stating, that falsely to assert that his Majesty was afflicted with mental insanity, was a criminal act, unless there was something to shew that the assertion was made on an occasion which the law considers as a reasonable excuse, so as to make such a publication justifiable.

Best, J.—It is impossible for any man to read this publication, without being perfectly satisfied that it is correctly described in the information, as a false, scandalous, and malicious libel. The editor of a newspaper thinks proper to

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state that the sovereign of this country is in a situation which renders him unfit to discharge the duties of his high office. He is not satisfied with stating this as a rumour, which I think he would be by no means justified in doing; but he affects to state the fact as from authority, that is, he undertakes for the truth of a statement, which is the most likely of all others to create discontent and confusion in the country. It is said, that the words "from authority" only mean, that intelligence had been communicated to the defendants by somebody likely to know that the fact was true. I believe such an interpretation was never before put upon that word. When a man states that he has a fact from authority, he means to assert that he has it from the relation of one who knows it to be true, and not from one who possibly may know it. It is said by the defendants' counsel, that the gist of this prosecution is malice. To that I accede, but it is necessary, that we should ascertain the meaning of the term "malice." I deny that in a Court of Law, we are to understand that word in its common, ordinary, and popular sense. I say that malice in the law does not mean only as in ordinary language, spleen, hatred, or ill-will against a particular individual, but means any wicked or mischievous intention of the mind. For instance, in the crime of murder, which is always alleged in the indictment to be committed with malice aforethought, it is neither necessary, in support of the charge, to shew that the offender had any enmity towards the deceased, nor would proof of the absence of ill-will afford the prisoner any defence, when it is proved that the act of slaying was intentional, and committed without any justifiable or excusable cause. There are many cases of murder, in which malice, in the common and ordinary sense, does not exist in the mind of the murderer, against the deceased, but merely a mischievous intent against him. A man, in ordinary language, can hardly be said to have a personally malicious intent against the deceased, when the primary object of the murder is merely to possess himself of his pro-

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perty. It appears to me, that the charge contained in this information was completely made out. But supposing the word "maliciously" was omitted in the information, I should say, that *falsely* to assert that the sovereign of the country was deprived of his reason (an assertion which must of necessity produce mischief), is an indictable offence. Malice in such a case is not necessary to be alleged or proved, nor need the Jury infer it. All that is necessary they should find is, that these defendants, without reason, published this false account. Whether they had malice against the king or not, is immaterial, if the account was of that nature which was likely to produce mischief; and there is no man in the country hardy enough to argue that such a representation is not of a most dangerous tendency, considering the consequences which it was calculated to produce. Malice had nothing to do with this offence. All that the defendants had to answer for, was the publication of a paper which had a tendency to produce the most mischievous consequences in the country. But if it was necessary to prove malice in the legal sense of the word, there was quite enough to justify the verdict of the Jury. I think the answer given by my Lord Chief Justice to the question put by the Jury, was most correct. It was admitted at the trial, that the libel was false in fact; but it was at the same time urged, that the defendants, at the time they published it, did not know that it was false. If so, why did they undertake to be responsible for its truth, by asserting that they published it from authority? Whether a publication be true or false, is not the issue on the trial of an information for a libel; the issue is, whether it be an innocent or mischievous paper. It is impossible for any man to read this paper, without being satisfied that the story contained in it, originated in the worst species of feeling. Supposing so dreadful a calamity had happened to the country, as the insanity of the king, it is not to be taken for granted, that the editor of a newspaper is at liberty to publish a statement of this description, before the

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constituted authorities of the country think fit to make the disclosure. It appears to me to be very improper for persons in the situation of the defendants, to judge when, in what manner, and under what circumstances, a statement of this description, even if true, should be given out to the world. I do not mean to give any opinion whether, if the statement was true, the defendants would be justified; but at the same time I do not wish it to be understood, that the truth of it would be a justification; for it strikes me, that if an editor of a newspaper were rashly to make such a disclosure, under circumstances likely to produce alarming consequences to the public safety, he would be criminally liable, even though his statement was founded in truth. The best course for editors of newspapers to adopt in such a state of things, is to act with decency, and to abstain from saying any thing on the subject, until a disclosure is made by the constituted authorities. Whether if the information is delayed for an unnecessary length of time, they are called upon to discuss the conduct of those who do not make the communication, is a totally different matter. I apprehend, that if a communication upon so important a subject should be improperly withheld, the just liberty of the press would allow any person to call the attention of the community to the circumstance; but I think it does not fall within the proper province or duty of any man conducting a newspaper, to put himself forward to make a disclosure of this nature, before it is made in a regular manner by those who are best able to provide against the effects of the agitation of public feeling, which it would be likely to produce. I am of opinion, that there is no foundation for a new trial in this case.

Abbott, C. J.—My learned brothers having delivered their opinion, that nothing which fell from me in my address to the Jury on the late trial, furnishes sufficient ground for granting a new trial, it is perhaps unnecessary for me to say any thing. One or two remarks, however, I feel

myself called upon to make. If it be true, that a malicious intention is necessary to render a person amenable to the law, who publishes defamatory matter, I say, that unless that malicious intention may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation, the honour, the feelings of all his Majesty's subjects, high and low, will be left without that protection from the law, which the law in every civilised country ought to afford. I would say, with reference to the particular expressions contained in this publication, that I am of opinion, that if any writer thinks fit to say that it is from *authority* he speaks, when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, he who makes an assertion in that form, may be justly stated to have made a false assertion. I am not casuist enough to say, that to call it an untrue assertion is a more proper mode of expression.

Rule refused.

The defendants were afterwards brought up for judgment, and Mr. *Harvey* was sentenced to pay a fine of 200*l.* and be imprisoned in the custody of the Marshal for three months, and to find sureties for three years; *Chapman* was sentenced to two months imprisonment in the same custody, and to find sureties for the like term.

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## Jervis *v.* Sidney, Bart.

*Friday, Nov. 7.*

Declaration against the sheriff for a false return, alleged, that from the day of the delivery of the writ, *until and at, and after the return* thereof, he was sheriff. The writ was returnable on the 12th, and the defendant's shrievalty expired on the 7th *February*:—Held, no variance.

THIS was an action against the sheriff of the county of *Kent*, for a false return to a writ of fieri facias. The declaration stated, that on the 28th *January*, the writ was

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delivered to the defendant, who then and from thence until, *and at and after the return of the said writ, was sheriff* of the said county of *Kent*. At the trial before *Graham*, B. at the last Assizes for the county of *Kent*, it appeared in evidence, that the writ was returnable on the 12th *February*, and that the defendant's shrievalty expired on the 7th of that month, whereupon it was objected, that the plaintiff must be nonsuited for a variance. The learned Judge over-ruled the objection, but saved the point, and the plaintiff had a verdict, subject to a motion for a nonsuit.

*Gurney* now moved accordingly for a rule nisi to enter a nonsuit, and contended, that the objection was valid, the allegation in the declaration having failed in proof. The defendant ceased to be sheriff when the cause of action arose, and therefore it was material to prove the allegation in the declaration. This was negatived by the evidence, and consequently it is ground of nonsuit.

PER CURIAM. It was quite immaterial to allege that the defendant was sheriff at the return of the writ. All that it was incumbent on the plaintiff to do was, to prove so much of the allegation as was necessary to maintain the action. In matters of contract, if so much of the declaration is proved as will maintain the sort of action brought, the plaintiff may recover pro tanto. He cannot recover upon a different ground of action; but where it is the same ground of action, and the allegation in the declaration goes beyond what is necessary to be proved, it does not affect the right to recover. In this case, all that was requisite for the plaintiff to shew was, that what the sheriff did, was in his character of sheriff; and although the cause of action may have in fact arisen after his shrievalty had expired, yet it is perfectly clear, that a sheriff may make his return after he has ceased to be sheriff. He may be called upon to make his return within six months afterwards. The point is too plain for argument.

Rule refused.

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BUTLER *v.* CAPEL.

*Friday, Nov. 7.*

The 53 *Geo.* 3. c. 141, requires, that in the memorial of an annuity, the "nature of the instrument" by which it is secured, shall be set forth. Where the memorial of an annuity described the instrument by which it was secured as "an *assignment* of certain hereditaments," and it appeared that in fact the instrument was an *underlease*:—Held, that in popular language, the instrument was sufficiently described.

THIS was an action of debt on bond, conditioned for the due payment of an annuity. The defendant craved oyer of, and set out the bond and condition (which recited that one *J. W.* had agreed to sell an annuity of 150*l.* per annum to the plaintiff, and secure payment thereof by a demise and assignment; and in pursuance of such agreement, did, by indenture, covenant to pay the said annuity; which indenture contained a demise of certain leasehold premises therein particularly described), and pleaded, first, non est factum; second, that there was no memorial of the said indenture enrolled within thirty days after the execution thereof, as required by the annuity act 53 *Geo.* 3. c. 141; and third, that there was no memorial of the said indenture, correctly describing the nature thereof, and the property thereby intended to be charged, for securing the payment of the annuity, enrolled as required by the same act. The plaintiff replied to the second and third pleas, that the indenture was duly enrolled, and assigned as breaches of the condition, non-payment of one year and a half of the said annuity. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the indenture mentioned in the condition of the bond, being produced, it appeared, that the grantor of the annuity was entitled to certain lands, houses, and premises for the residue of a term of one thousand years; and for securing the payment of the annuity, did grant, bargain, sell, and demise the said premises to certain trustees therein mentioned, during the remainder of the said term of one thousand years, except the last ten days of the said term, yielding and paying a peppercorn rent. In the memorial, this deed was described as "a grant of an annuity of 150*l.* and an assignment of certain hereditaments and premises for securing the same." On the part of the defendant it was insisted, that this was a mis-

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description of the deed, and not in compliance with the requisites of 53 *Geo.* 3. c. 141, which requires that the nature of the instrument given for securing the annuity, shall be properly set forth in the memorial. The indenture in question was not an assignment but an under-lease, and therefore it was not properly described in the memorial, and consequently the annuity being void, no action could be maintained on the bond. The Lord Chief Justice held, that as the instrument was described in the ordinary and popular language of mankind, it was sufficient to satisfy the requisites of the act, and therefore over-ruled the objection, but reserved the point. A verdict was recorded for the plaintiff, and

*Copley*, S. G. now moved to enter a nonsuit. The 53 *Geo.* 3. c. 141, gives a form of enrolment; and in the second column of the schedule, the parties are required to describe the "nature of the instrument." The question in this case is, whether the nature of the instrument has been set forth. It is described as "a grant of an annuity of 150*l.* and an *assignment* of certain hereditaments and premises for securing the same." The evidence adduced to support this description, is a demise or under-lease of certain leasehold premises, and not an assignment of certain hereditaments and premises; consequently the instrument has not been truly described. An assignment is a very different thing from an under-lease. The assignee of a lease is bound by all the original covenants respecting the payment of rent to the lessor, and by all other obligations, but an under-lessee stands in a very different situation; he is only bound by the covenants in his own lease. In this very case, the under-lessee is bound only to pay a nominal rent; whereas, if there had been an assignment of the original lease, the assignees would have been bound to pay the rent which the original lessor had reserved; so that the instrument given in evidence is very different from that mentioned in the memorial. If, therefore, the directions contained in the sche-

dule to the annuity act are to be construed strictly, it is quite obvious that they have not been complied with. Undoubtedly, in popular language, an assignment may mean a conveyance; but according to the rules of construction always applied to this act, the directions in the schedule ought to be strictly complied with. *Smith* v. *Pritchard* (*a*), *Darwin* v. *Lincoln* (*b*), and *Cheek* v. *Jefferies* (*c*). Here, the indenture is in substance an under-lease, and therefore when it is described as an assignment, the plaintiff has not properly memorialised the instrument, and must fail in his action.

ABBOTT, C. J.—I am of opinion, that the verdict in this case ought not to be disturbed. If in pleading, the pleader had alleged this to be an assignment of the premises in question, and had given this deed in evidence, he would not have proved his allegation, because the pleader is to state the instrument according to its legal effect and operation, which he would have done untruly if he had described this as an assignment, inasmuch as the grantor has not, in point of law, parted with all his interest. But here, all that is required in the memorial is, that the nature of the instrument shall be stated. In the column of the schedule, under the head "Nature of instrument," are given examples of the manner in which the instrument is to be described, namely, "Indenture of lease and release;" "Bond in penalty of 1200*l*." "Warrant of attorney to confess judgment on the same bond." It seems to me, therefore, that we are to understand the words "Nature of instrument," as meaning such a description of it as would be understood in the common and popular sense of mankind, as applicable to it. I thought so at the trial, and I am still of that opinion.

BAYLEY, J.—If the argument in support of this motion were to prevail, it would be incumbent on the party, in

(*a*) Ante, vol. ii. p. 374. (*b*) 5 B. & A. 444. (*c*) Ante, 185.

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every case, to describe the instrument according to its legal operation, which in many instances would be an extremely difficult thing to do. If the plaintiff had over-stated the description of the instrument in the memorial, there would be a great deal in the objection, but he has understated it, and therefore there is no ground for saying that he has not sufficiently complied with the requisites of the statute. In *Harrison* v. *Vallance* (a), which was an action of trover, the declaration described a certain deed as "an assignment purporting to be a conveyance," and it appearing that the conveyance was in fact by lease and release, it was held no variance.

HOLROYD, J.—In strict legal phraseology, this instrument does not operate as an assignment, because when a man executes an assignment, in strictness of law he parts with all his interest; but in common parlance a man may be said to have assigned his estate when he has parted with it only for a period of time. It is an assignment in common parlance for so long a time as he has parted with it. I therefore think there is nothing in the objection.

Rule refused (b).

(a) 1 Bing. 45.

(b) *Best*, J. was absent.

*Friday, Nov. 7.*

STOREY v. BIRMINGHAM.

The Court will not, on motion, cancel a bail-bond given by a person claiming to be an *Irish* peer, unless his peerage is clearly made out.

*CROWDER* moved for a rule to shew cause why the bail-bond given by the defendant (who had been arrested on a bill of *Middlesex*) should not be delivered up to be cancelled, on the ground that before and at the time of the arrest, he was a peer of that part of the United Kingdom of *Great Britain* and *Ireland*, called *Ireland*, by the title of Lord *Atherley*, &c. of which fact there was a positive affidavit. There was no statement that the defendant had ever sat in Parliament, or had ever done any act in the cha-

racter of a peer; but it was submitted, that the fact of his being an *Irish* peer, was sufficient to privilege him from arrest by the *Irish* act of Union.

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PER CURIAM. Before we can interfere summarily in a case like this, it must be a clear case of peerage. If the defendant be a peer, the answer to this motion is, that he may plead his peerage, and establish his title in a regular way.

Rule refused.



CLARK v. The INHABITANTS of The HUNDRED of BLYTHING.

*Saturday, Nov. 8.*

The owner of stacks of corn maliciously set on fire, may maintain an action against the hundred, on the 9 *Geo.* 1. c. 22, although he has previously received the full amount of his loss from an insurance office.

THIS was an action on the case, on the statute 9 *Geo.* 1. c. 22, to recover from the hundred of *Blything*, the value of certain stacks of corn and hay of the plaintiff, which had been wilfully destroyed by fire, within the hundred, by some person or persons unknown. The declaration stated, that the offence was committed within one year before action commenced; that notice of the circumstance was given by plaintiff to three inhabitants of the town of *H.*, which was near to the place where the offence was committed, within ten days after it occurred; that within four days after that notice, plaintiff gave in his examination before a magistrate of the county, in which he deposed, that the stacks had been set on fire by some person or persons unknown; and that six months and upwards had elapsed, and that the offender or offenders had not yet been apprehended or convicted. "Yet the said inhabitants of the said hundred of *B.* have not, although often requested, made full, or any satisfaction or amends to the said plaintiff for the damage and injury by him sustained as aforesaid, to the damage of the said plaintiff of 200*l.*" Plea, Not Guilty, and issue thereon. At the trial before *Bosanquet*, Serjt. at the last Assizes for the county of *Suffolk*, evidence was given in

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support of all the allegations in the declaration, but as it also appeared that the plaintiff's premises and stock, including the property in question, had been insured against fire, and that he had been paid the full amount of his loss by the insurance office, it was contended, on the part of the defendants, that he had no longer any right of action against them. The objection was over-ruled by the learned Serjeant, and the plaintiff had a verdict, with leave to the defendants to move to enter a nonsuit.

*Storks* now moved accordingly, and renewed the objection. Both the language and policy of the statute upon which this action is grounded, require that the party shall be suffering a continuing damage at the time when he seeks satisfaction from the hundred; and therefore as the plaintiff had received the full amount of his loss from the insurance office before the action was commenced, he had then ceased to sustain any damage, and it would be a violation of the statute to allow him to recover against these defendants. Section 7, of the act provides, that the inhabitants of the hundred shall make satisfaction to every person for the damage he shall have sustained by the setting fire to any stack of corn, &c. committed by any offender against that act; so that it is clear, the legislature intended to afford remuneration to the person actually injured only, and did not contemplate the introduction of any third party, who might previously have insured his property. The 3 *Geo.* 4. c. 33, the object of which was to regulate the mode of recovering for damage occasioned by offences against the 9 *Geo.* 1. c. 22, also supports this argument, for in ss. 3 & 4 of that act, the legislature evidently confine the right of recovery to the individuals whose property is destroyed. It has been decided, that both the 1 *Geo.* 1. stat. 2. c. 5, and the 9 *Geo.* 1. c. 22, are remedial statutes, and intended to relieve the party damaged by the illegal act. *Ratcliffe* v. *Eden* (a), and *Hyde* v. *Coggan* (b). Now here, the party

(a) Cowp. 485.

(b) 2 Doug. 699. See *Jackson* v. *Pearson*, ante, vol. ii. 439. *Allen* v. *Ayre*, ante, page 96.

damaged has received satisfaction from the insurers, and it is not competent to them to remunerate themselves by an action against the hundred in his name. It must be admitted, that in *Marshall on Insurance* (a), a MS. case is mentioned under the name of *Mason* v. *Sainsbury*, which militates against the present argument. That was an action upon the Riot Act; the plaintiff had received the amount of his loss from an insurance office, and this Court certainly held, that the insurers might recover from the hundred in his name, though not in their own. That, however, is a solitary case, and does not appear to have received a very solemn decision, and therefore upon a question so comparatively unsettled, and of such vast public importance, the Court will at least think further consideration desirable.

ABBOTT, C. J.—The question upon which the present application depends, was decided in this Court many years since in the case of *Mason* v. *Sainsbury*, and unless there is great doubt as to the propriety of that decision, it would not become us now to disturb it. I cannot say that I entertain any doubt as to its propriety. The intention of the legislature in passing this and the other statutes of the same nature, was twofold; to render the inhabitants of hundreds vigilant for their own sake as well as that of the public, by making them interested in the prevention of offences; and where that is impossible, in the apprehension and conviction of offenders. This particular statute contains provisions which are applicable to both those objects, for section 7 renders the hundred liable to make satisfaction for the injury sustained, and section 9 provides, that they shall not be so liable if the offender is apprehended and convicted within six months after the commission of the offence. With respect to the question, whether it is competent for the defendants to set up in their own defence a contract made between third persons, it seems to me that the principle of the act fully justifies the decision of the former case, and that we should be acting in

(a) Vol ii. p. 706.

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violation of that principle if we were to disturb the present verdict.

BAYLEY, J.—I am of the same opinion. The principle is not new, or peculiar to this subject. It has been held, in the case of damage done to a ship, that the owner may recover from the underwriters for his own benefit first, and may afterwards sue the author of the damage in his own name for the benefit of the underwriters.

HOLROYD and BEST, Js. concurred.

Rule refused.

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*Monday, Nov.* 10.

ASTLE and Another *v.* THOMAS and BALDWIN.

In the parish of *B.*, consisting of the township of *B.*, and several hamlets, two churchwardens were appointed by the township, and two by the rest of the parish, who made separate rates for their own divisions respectively:—Held, that the acting churchwardens for the township, might maintain assumpsit against their predecessors, for a balance remaining in their hands, without joining the other churchwardens as plaintiffs, or defendants, and without proving that their appointment was strictly legal.

ASSUMPSIT by plaintiffs, churchwardens of the township of *Burton-upon-Trent*, in the parish of *Burton-upon-Trent*, against defendants, late churchwardens of the same township, for money had and received to the use of plaintiffs *as such churchwardens*. Plea, by defendant *Thomas*, non assumpsit; and by defendant *Baldwin*, the non-joinder of two other persons, *I. T.*, and *I. H.*, as defendants. Issue on both pleas. At the trial before *Park*, J. at the last Assizes for the county of *Stafford*, the facts were these:—The parish of *Burton-upon-Trent* consists of the township of *Burton-upon-Trent*, and of several hamlets. The parish has always had four churchwardens, two appointed by the township, and two by the hamlets, jointly. The parish has only one parish church, which is situate within the township. The two sets of churchwardens have always made separate rates. At the time when the defendants went out of office, a balance of 18*l.* was remaining in their hands. *I. T.* and *I. H.* were the churchwardens for the

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hamlets during the same period that the defendants were churchwardens for the township. It was objected, on the part of the defendants, that the four churchwardens appointed for the parish, formed one corporate body, and therefore that the action ought to have been brought by all the present, against all the former, churchwardens. The learned Judge, however, over-ruled the objection, and the plaintiffs, under his direction, obtained a verdict for the balance of 18*l.*

*Campbell* now moved for a new trial, on the ground, that the learned Judge had mis-directed the Jury in point of law. It must be admitted, that no common fund was ever raised in the parish, and that it was in evidence that the churchwardens for the township, and those for the hamlets, had constantly made separate rates on account of their own respective divisions. But that fact will not authorize either of them in suing, nor will it render them liable to be sued alone, because it has been decided, that by law there must be one fund for the whole parish, and that separate bodies of churchwardens in one parish, cannot legally make separate rates. *Rex* v. *Gordon* (*a*). [*Bayley*, J. That case is materially distinguishable from the present, because the rate there in dispute was a poor-rate; there may exist an immemorial custom for a church-rate to be raised in a particular way, but there cannot for a poor-rate, which has been in existence only since the reign of *Elizabeth*.] Still, the plaintiffs cannot maintain this action, because they sue as churchwardens of the township; there cannot be an appointment of churchwardens for a township; it must be for a parish; consequently, if the plaintiffs have been elected and sworn as officers of the township, they have been illegally appointed, and cannot stand before the Court in the character which they have adopted; if, on the other hand, they were appointed for the parish, they have mis-described themselves in the first place, and they should have joined

(*a*) 1 B. & A. 524.

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the other two churchwardens, as plaintiffs, in the action. Upon either view of the case, therefore, the defendants are entitled to a new trial.

Abbott, C. J.—I think we are not at present called upon to decide whether the appointment of these plaintiffs was strictly legal or not; we are bound to presume that it was, until the contrary is clearly shewn. It is in evidence, that the two districts for which the several sets of churchwardens acted, kept two separate purses, which were supplied by separate rates, and that there was no common fund in the parish. The parish, therefore, considered at large, has suffered no injury by this sum of money not being paid over, but the injury done is to that portion of the parish, by which, and for the benefit of which, it was raised. It seems to me, therefore, that as the plaintiffs appear cloathed with a character which entitles them to direct the application of this money, they are the proper persons to maintain an action to recover it from the party who withholds it from them.

Bayley, Holroyd, and Best, Js. concurred.

Rule refused.



Warren v. Howe.

*Monday, Nov.* 10.

A judgment debt is not "property," within the meaning of the 55 *Geo.* 3. c. 184. Sched. part 1. tit. *Conveyance*, and therefore an assignment by indenture, of a judgment debt, does not require an ad valorem stamp, but must have the common deed stamp.

THIS was an action of covenant on an indenture of assignment. Plea, non est factum, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the plaintiff produced the indenture, which recited, that the defendant being indebted to the plaintiff in a sum of 50*l.* 5*s.* and being unable to pay, had requested the plaintiff to accept an assignment of a judgment recover-

ed by the defendant against one *Morgan*, to the amount of 168*l.* as a security to him (the plaintiff) for his debt; that the object of the assignment was to secure to the plaintiff the payment of 50*l.* 5*s.* upon trust, out of the money that might be recovered upon the judgment, first, to pay the costs of the assignment, and the expences of enforcing the judgment, not exceeding 30*l.* and, second, to pay himself his debt of 50*l.* 5*s.*, and pay over the surplus to the defendant. The indenture had an ad valorem stamp of 1*l.* 10*s.* and it was objected for the defendant that it should have had the common deed stamp of 1*l.* 15*s.*; and the learned Judge being of opinion that the objection was well founded, directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for 50*l.* 5*s.* if the Court should be of opinion that the instrument had been properly stamped.

*Jeremy* now moved according to the leave given. This case depends upon the construction of the 55 *Geo.* 3. c. 184, Sched. part 1, tit. *Conveyance.* That statute requires a stamp of 1*l.* 10*s.* "upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, where the purchase or consideration money therein or thereupon expressed shall amount to 50*l.* and not exceed 150*l.*" [*Abbott*, C. J. The question is, whether this instrument is a conveyance of *property* within the meaning of the act; if it is so, it is duly stamped, and the plaintiff is entitled to a verdict.] A judgment debt is property within the meaning of the act, and the assignment of it is an assignment of a right to property within the description given in that part of the schedule cited. There is no doubt that a debt upon a judgment may be assigned (*a*), and a chose in action, it is said, may be assigned for a just debt (*b*); and although in those particular cases the assignor is the only party who can sue, still the assignee acquires an interest in

(*a*) Littleton's Rep. 116.  (*b*) Vin. Abr. Assignment, D.

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the right assigned; as was laid down by *Buller*, J. in the case of *Master* v. *Miller* (*a*). It has indeed been held in one case in the Common Pleas, that this clause applies exclusively to actual sales between vendor and purchaser, and therefore that a deed of assignment of property to a trustee in trust to sell, is not a conveyance within the meaning of this clause, *Coates* v. *Perry* (*b*); but in this case, although the assignee is a trustee for some purposes, still there is an actual transfer of the assignor's right to the amount of the debt owing to the assignee. But, not relying too strongly on this part of the case, this instrument seems also to come within the meaning of another part of the Schedule, title *Mortgage*, as being " a conveyance of property in trust for sale, intended only as a security for money," upon which, where the sum to be secured exceeds 50*l.* and does not exceed 100*l.* a similar duty of 1*l.* 10*s.* is imposed. The instrument distinctly recites, that the assignment is made " for the better securing" the repayment of the debt of 50*l.* 5*s.* upon certain trusts to ensure that object; and, consequently, it comes completely within the terms of that branch of the statute, and is, with reference to that, sufficiently stampt. Upon either of these grounds, the plaintiff is entitled to have a verdict entered in his favour.

ABBOTT, C. J.—It happens, on the present occasion, that the ad valorem duty is less than would have been payable upon the common deed stamp. In general it happens otherwise. Whether the clause imposing the ad valorem duty is cumulative or not, we need not decide, because, adverting to the language of the act, I thought at the trial, and I am of the same opinion now, that a judgment debt is not property within the meaning of the clause referred to. The act speaks of " lands, tenements, rents, annuities, or *other property*, for or in respect of the deed, whereby the lands or other things *sold*, shall be conveyed to the purchaser." I think the terms, " other property," must be understood as

(*a*) 4 T. R. 340. (*b*) 6 J. B. Moore, 188.

applying to such property as is ordinarily the subject of sale, and readily convertible into money. It cannot be said that a judgment debt falls within that description, and therefore this instrument is not governed by the clause already alluded to. With respect to the mortgage clause, that clearly has no application to it, because it is not a conveyance "in trust for sale." I am therefore of opinion that this deed was not sufficiently stampt, and that the nonsuit was right.

HOLROYD, J.(a) and BEST, J. concurred.

Rule refused.

(a) *Bayley*, J., was absent.

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DOE, on the Demise of WILMOT, Esq. *v.* PICKERING and Others.

*Tuesday, Nov. 11.*

The exemplification of a recovery, suffered in bar of an entail, cannot be impeached by the recovery deed itself, although it is suggested that there have been alterations and erasures made in the latter, not noticed in the former.

EJECTMENT for lands and premises, situate in the parishes of *Spondon* and *Chaddesden*, in the county of *Derby*. At the trial, before *Garrow*, B. at the last *Derbyshire* Assizes, the case was this:—By articles of agreement, dated 10th *December*, 1718, *Edward Wilmot*, the grandfather of the lessor of the plaintiff, covenanted, in consideration of his marriage with *Catherine Coke*, to settle the estate in question, "to the use of himself for his natural life, remainder to the use of trustees, also for his life, to preserve contingent remainders; remainder to the use of his wife, for her life, for her jointure, and in bar of dower; remainder to the use of their eldest son and his heirs male; remainder to the use of all their other sons, and their heirs male, in succession, the elder to be always preferred; remainder to the use of their daughters, as tenants in common, and their heirs; remainder to the use of his heirs generally." *Edward Wilmot* died in 1748, seised of the estate in fee, but without having made the marriage settlement, and by his will,

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dated 16th *April*, 1734, gave all his real and personal estates to his wife, to *Richard Ballidon Wilmot*, (the father of the lessor of the defendant) to *Susan Coke*, and *Richard Wilmot* (the father of the lessor of the plaintiff) surviving. By indentures of lease and release, dated 29th and 30th *November*, 1750, made between *Catherine Wilmot* (the widow) of the one part, and *F. Lowe*, and *S. Webster*, of the other part; after reciting the agreement, and that no settlement had been made pursuant to it, and reciting the will of *Edward Wilmot*, *Catherine Wilmot* (the widow) granted to the said *F. L.* and *S. W.* the estate in question, "To hold to them, their heirs and assigns, for ever, to the use of herself, for her life; remainder to the use of her eldest son and his heirs male; remainder to the use of her second son, and his heirs male; remainder to the use of her four daughters, *Cassandra Bayles*, wife of *Martin Bayles*, of *London*, and *Elizabeth Wilmot*, *Mary Catherine Isabella Wilmot*, and *Ann Wilmot*, and their heirs, as tenants in common; remainder to the use of her own right heirs for ever." *Catherine Wilmot* died in *August*, 1751, leaving the said *Francis Ballidon Wilmot* her surviving. By indentures of lease and release, dated 1st and 2d *October*, 1751, the lease made between the said *F. B. Wilmot*, of the one part, and *Henry Wilmot* and *Francis Newdigate*, of the other part, and the release made between the said *F. B. Wilmot*, of the one part, the said *H. Wilmot* and *F. Newdigate*, of the second part, and *John Bateman* and *Charles Kirkman*, of the third part; the said *F. B. Wilmot* granted the estate in question to the said *H. Wilmot* and *F. Newdigate*, their heirs and assigns, To hold to them and their heirs, to suffer a recovery, which said recovery it was thereby declared should enure "to the only proper use and behoof of the said *F. B. Wilmot*, and of his heirs and assigns for ever." *F. B. Wilmot* continued in possession of the estate till the year 1798, when he died intestate, and the estate descended to the Rev. *Francis Wilmot*, his only son, and heir at law, who continued in possession till *April*, 1818, when he died, a bachelor and

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intestate, and the estate descended to *Susan*, the wife of *John Coke*, his only sister, and heir at law, under whom the defendants are in possession as tenants for a term. Upon the production of the recovery deed, and the exemplification thereof, it appeared that they differed from each other, the former having several erasures and alterations in the dates, the attestations, and various words in the body of the deed, which were unnoticed in the latter. The lessor of the plaintiff claimed as tenant in tail under the settlement of 29th and 30th *November*, 1750, and the defendants, for their lessor *John Coke*, claimed under the recovery. It was contended, on the part of the lessor of the plaintiff, that the recovery deed bore upon the face of it evident marks of fraud, and was therefore no bar to the entail; and on the part of the defendant that the exemplification being free from that objection, and being in the nature of a record, was in itself sufficient evidence of a good recovery, and therefore operated as a bar to the entail, independently of the deed itself; and the learned Judge, being of that opinion, directed the Jury that they were bound in point of law to find a verdict for the defendants, which they did accordingly.

*Vaughan*, Serjt., now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground of misdirection. The deed was clearly fraudulent upon the face of it; it was plain that it had been executed at one period, and for one purpose, and had been recently altered so as to bear a later date, and to answer a different purpose. At least, therefore, the validity of the deed was a question which ought to have been inquired into, and upon which the Jury should have been left to decide. Without such inquiry the exemplification was not conclusive evidence of the recovery, and ought not to have been admitted for that purpose.

ABBOTT, C. J.—I am of opinion that the direction of

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the learned Judge was correct in point of law, and that the verdict was right. The exemplification was conclusive evidence of the defendant's title, and the state of the deed after such a lapse of years, was perfectly immaterial. The reasoning of Lord *Holt*, in the case of *Lacy* v. *Williams* (*a*), is quite decisive of the present.

Bayley, J.—The exemplification of the recovery is a record, and it is not competent for us to look out of the record into the deed, in order to impeach the one for a supposed defect in the other. If the deeds were executed during the life of the tenant for life, still, if the recovery was not suffered till after his death, it would then become valid.

Holroyd, J.—The appearance of the deed, however suspicious it may be, cannot now affect the recovery; the recovery would be good even though the deed were no longer in existence. That principle has been repeatedly laid down; in *Roe* v. *The Archbishop of York* (*b*), where it was held, that the mere cancelling in fact of a lease, is not a surrender of the term thereby granted, within the statute of Frauds; and in *Lord Downe's Case* (*c*), where it was held, that where the deed to make the tenant to the præcipe is lost, the recovery may be amended by the inrolment itself being brought into Court.

Best, J. concurred.

Rule refused (*d*).

(*a*) 2 Salk. 568.

(*b*) 6 East, 86.

(*c*) 4 Taunt. 798.

(*d*) See *Warren* v. *Greenville*, 2 Stra. 1129. *Goodtitle* v. *The Duke of Chandos*, 2 Burr. 1065. *Gartside* v. *Radcliffe*, 1 Ch. Ca. 292, and 14 *Geo.* 2. c. 20. s. 5.

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*Wednesday, Nov. 12.*

## LISTER *v.* BROWN.

*In an action on the 11 Geo. 2. c. 19, against a tenant for fraudulently removing his goods to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal takes place with his privity.*

THIS was an action on the statute 11 *Geo.* 2. c. 19, for fraudulently removing goods to avoid a distress for rent. At the trial before *Park*, J., at the last *Shropshire* Assizes, it appeared in evidence, that the defendant had been tenant to the plaintiff of a considerable farm, but becoming embarrassed in his affairs, determined to give up the farm to his son, with an assignment of his effects, in consideration of the son paying the arrears of rent, and discharging certain debts then owing in respect of the farm. It was determined that an application should be made to the plaintiff to take the son as tenant instead of the defendant, at a reduced rent. Application was accordingly made to the plaintiff, who agreed, that as soon as the rent in arrear was paid, the son should thereafter be considered as tenant, but nothing was done to ratify the agreement, and the defendant still continued liable for the rent. In the mean time possession was delivered to the son, who on the 26th *March* following, clandestinely removed the goods to avoid the landlord's distress for rent, and this action was brought against the defendant. The father knew nothing of the removal, except that it appeared in evidence that on the evening of the 25th *March*, the son called upon him and told him of his intention to remove the goods. Upon which the defendant said "what is to become of me? I shall be liable for all the arrears of rent." To this the son answered, "I will take care of you." The learned Judge left it to the Jury, whether under these circumstances the defendant was aiding and assisting in the distress; for if he was, his Lordship was of opinion that the defendant would be liable under the statute. The Jury found for the plaintiff.

*Pearson* now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. The

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question is, whether the defendant, who must certainly be considered as the tenant, and therefore liable for the rent, can be answerable, unless he does some act shewing that he is a party to the fraudulent removal. The circumstance of his being cognizant of what is about to be done, a few hours before the actual removal takes place, will not make him liable, unless he takes some part in the unlawful act. The proposal for removing the goods originated with the son, and not with the father, and therefore, though the son might be liable for aiding and assisting in the act, still the father is not answerable, unless he does something in furtherance of the illegal object. The statute makes the tenant who shall fraudulently remove, and those who aid and assist in the removal, liable to the penalty. Here the father is the tenant, and it is clear that he does nothing whatever as tenant to bring him within the act; and if he is to be charged as aiding and assisting, he ought not to have been sued in the character of tenant. The question here is, whether the tenant removed. If he did not, then the plaintiff must fail in this action.

ABBOTT, C. J.—If in such a case as this, the tenant himself is not answerable, the statute would be utterly defeated, because nobody would be answerable. All that a tenant would have to do, would be to leave his farm, go to a distance, and some of his family may in the mean time clandestinely carry off all the effects, leaving the landlord destitute, perhaps, of the means of proving in what manner the removal takes place. This statute, though it is penal, is also remedial, and must receive a liberal construction. It places those who shall do the illegal act, and those who shall aid and assist, on the same footing; they are all liable to the same consequences as principals. I think the case was properly left to the Jury.

BAYLEY, J.—The question is, whether the act of removal by the son was not, coupled with the other evidence, sufficient to shew that it was the act of the father also. I am

of opinion that it was, and that the Jury drew the right conclusion.

HOLROYD and BEST, Js. concurred.

Rule refused.

## KENNEDY v. GOUVEIA.

*Wednesday, Nov. 12.*

*The consignee and agent of a vessel chartered for a specific voyage, enters into an agreement with the captain, describing himself as "consignee and agent" of the above brig and cargo, on behalf of Mr. M. merchant, of L." the agreement stating, that "it is witnessed, that the said parties agree" that the vessel shall go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party, and then signs the agreement in his own name, without describing himself as agent:—Held, that he made himself personally liable for the freight of the homeward voyage.*

ASSUMPSIT on a charter-party of affreightment by plaintiff, the master, to one *Meirelles*, of the ship Sir *Alexander Mackenzie*, on a voyage from *Liverpool* to *Ceara* and *Aracati* and back, with cargoes. The declaration set out the charter-party, and then averred, that the ship arrived at *Ceara*, and unloaded part of her cargo there, but that before she had wholly unloaded, an agreement was entered into between plaintiff and defendant, which was also set out, and was as follows:—"*Ceara*, 30th *Nov.* 1822. It is mutually agreed between Captain *Kennedy*, master of the brig Sir *Alexander Mackenzie*, of the one part, and Mr. *Gouveia*, consignee and agent of the above brig and cargo, on the behalf of Mr. *Meirelles*, merchant, of *Liverpool*, of the other part, witnesseth, that the said parties agree to the following; that is to say, the said brig shall proceed direct to *Maranham*, with part of her outward cargo, and there discharge the same, instead of delivering it here, being deemed unsafe to the interest of the concerned, to be disposed of in *Ceara*, on account of the disordered state of affairs in general; and on delivery of same said cargo at *Maranham*, is there to receive on board a full and complete cargo of cotton, for *Liverpool*, at the same freight as the vessel would have got had she proceeded on to *Aracati*, and there loaded a cargo as stipulated in the charter-party for *Liverpool*. Ere we proceed further, it is to be understood,

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that this agreement is not to be considered as a general deviation from the original charter-party, but rather a continuance of the same, made, as above stated, on account of political motives. Mr. *Gouveia* also agrees to furnish the said brig, if possible, with a pilot to *Maranham*, and likewise to pay two-thirds of the port-charges there, which is considered by both parties sufficient compensation to the ship for such change of voyage. The discharging and taking in the cargo, the payments, demurrage, &c. at *Maranham*, shall remain the same as if the vessel had remained here or proceeded to *Aracati*, as specified in the charter-party; both parties, therefore, clearly understanding the above agreement, sign their names," &c. It then averred, that in pursuance of this agreement, the ship went to *Maranham*, and there discharged the rest of her cargo, and received on board a full cargo of cotton for *Liverpool*, where she afterwards arrived and discharged the same, and that the freight amounted to 812*l*. 7*s*. 1*d*. Breach, that defendant, on request, would not pay that sum, or any part thereof. Plea, Non Assumpsit, and issue thereon. At the trial before *Bayley*, J. at the last *Lancashire* Assizes, the plaintiff's case rested upon the production and proof of the charter-party and agreement, proof of the averments respecting the change of voyage, and discharge of cargo, and the testimony of Mr. *Meirelles*, who stated, that he had never authorised the defendant to vary the charter-party, and had therefore thrown up the contract as void; that he chartered the vessel on his own account; and that the outward cargo was on account of the defendant, and the homeward cargo on account of himself. In answer to this case, it was contended, that the defendant having acted merely as the agent of *Meirelles*, the original charterer, was not personally liable upon the agreement, and therefore that the plaintiff must be nonsuited; but the learned Judge being of opinion, that as he had acted without any direct authority from his principal, he was, in point of law, liable upon his own undertaking, directed the Jury

to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

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*Littledale* now moved accordingly, and renewed the objection. It is clear from the language of the agreement, that the defendant was acting as an agent, in the way which he thought most beneficial for his principal, under an emergency. It states, that the defendant acts "on behalf of Mr. *Meirelles*," and assigns as his motive, "it being deemed unsafe to the interest of the concerned," that the ship should remain at *Ceara*, which was a circumstance that would fairly give him a general and implied authority to act as he did. [*Abbott*, C. J. The agreement witnesses "that the said parties agree" without any reference there to any third person; the defendant is one of "the parties;" then are there not two modern cases, *Appleton* v. *Binks* (*a*), and *Burrell* v. *Jones* (*b*), decisive of this?] Both those cases are distinguishable from this; in the one the agreement was under seal, and the defendants there *covenanted* in express terms; in the other there was a distinct personal undertaking. This is a mere memorandum of agreement; the defendant only *agrees*, and that expressly *on behalf of another*. [*Abbott*, C. J. So it was in *Appleton* v. *Binks*; the defendant there covenanted "for and on the part and behalf of" another person; and what distinction is there between the words "covenants" and "agrees"? If a man covenants in his own name on behalf of another, he is liable on his covenant; and if he promises in the same manner, he is liable upon his promise in assumpsit.] In *Bowen* v. *Morris* (*c*), twice argued in the Exchequer Chamber, *Mansfield*, C. J. said, "this contract did not bind the defendant personally, because he did not contract on behalf of himself personally; he acted merely as an agent." That applies precisely to the present case. [*Abbott*, C. J. There

(*a*) 5 East, 148.
(*b*) 3 B. & A. 47.
(*c*) 2 Taunt. 374. See *Macbeath* v. *Haldimand*, 1 T. R. 172. and *Iveson* v. *Connington*, ante, vol. ii. 307.

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the defendant was the public officer of a corporation, and acted wholly as their servant.] Besides there is no mutuality in this contract; the plaintiff had no authority to agree to the substitution of another voyage; he was exceeding his power, as master, in so doing; *Burgon* v. *Sharpe* (a); and therefore the contract cannot bind the defendant. If the plaintiff had sued on the original charter-party, it would have been no defence to that action, that a subsequent agreement not under seal had been made between the parties. [*Bayley*, J. I am not quite certain of that; at all events it would have gone in mitigation of damages.] The original charter-party was abandoned on account of a supposed deviation in the voyage, but the agreement expressly states that the ship's going to *Maranham* "is not to be considered as a general deviation from the original charter-party, but rather a continuance of the same." In fact it was a continuance of it; it was entered into by the defendant as the agent of *Meirelles*, and for his benefit, and therefore the plaintiff's remedy is against him, and he ought not to be allowed to throw off his responsibility, and cast it upon the defendant.

ABBOTT, C. J.—The language of the agreement, the conduct of the defendant, and the cases to which I originally alluded, all combine to shew that the defendant is liable in this action. He signs the agreement in his own name, and does not say that he signs for another. The language of the instrument is, "It is agreed between the parties." Who are the parties? The defendant and the plaintiff; therefore he has made himself personally liable, for the default of his principal on the one hand, and on his own personal undertaking on the other. I think the case was properly ruled at Nisi Prius.

BAYLEY, J.—The arrangement expressed in the agreement was a bargain between the plaintiff and the defendant,

(a) 2 Campb. 529.

and whether made with, or without the authority of *Meirelles*, is quite indifferent now; the defendant is equally liable upon the agreement as it is worded. The evidence clearly proved that the defendant gave instructions to the plaintiff all the way through, and conducted himself as a principal from first to last.

HOLROYD and BEST, Js. concurred.

Rule refused.

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*Wednesday, Nov. 12.*

## DEN, on the Demise of PETERS and Wife *v.* HOPKINSON.

Upon a written agreement to demise from the following "*Lady-day*," a notice to quit "on the 6th of *April*," is good, upon parol evidence that by "*Lady-day*," the parties meant "*old Lady-day*." Such evidence is admissible, where the written agreement is not under seal.

EJECTMENT for lands and premises situate in *Hotham* and *North Cave*, in the county of *York*. At the trial before *Bayley*, J., at the last *Yorkshire* Assizes; the case was this:—The lessor of the plaintiff, in the year 1822, became entitled to the premises in question, in right of his wife, who succeeded upon the death of her brother, the tenant for life. In *March*, 1821, and previous to the death of the tenant for life, the agent of a Mr. *Higgins*, who, as mortgagee of the estate, then, had the management of it, entered into a written agreement with the defendant, which was in the following terms:—"*Tadcaster*, 21st *March*, 1821. Memorandum of agreement made this day, whereby *Richard Ballie*, on behalf of *Godfrey Higgins*, Esq. agrees to let, and *John Hopkinson* agrees to take all that farm, &c. now occupied by Mr. *John Clark, and which the said J. C. is about to quit at Lady-day next, when the said J. Hopkinson is to enter*, at the yearly rent of, &c.; and it is agreed that Mr. *Hopkinson* is to quit upon the same terms as he enters the farm." This agreement was signed by the parties, and attested, but was not sealed. The defendant entered on the 6th *April*, 1821, and continued to occupy the farm after the lessor of the plaintiff became entitled, but without any fresh agreement, and

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on 20th *November*, 1822, he paid half-a-year's rent to him, for which he had the joint receipt of himself and wife. On the 8th *October*, previous to this payment, a notice was served on the defendant, to quit the farm "*on the sixth day of April next*;" and the defendant having held over, the present action was brought. It was objected for the defendant that this notice was irregular, the tenancy being from *Lady-day* to *Lady-day* generally, which by intendment of law must be taken to mean *new Lady-day*, and the notice being to quit at *old Lady-day*. To obviate this objection, witnesses were called for the lessor of the plaintiff, to prove that the real understanding between the parties was, that the tenancy should commence at *old Lady-day*. This evidence was objected to on the part of the defendant, on the ground that parol testimony could not be admitted to vary or explain a written document. The learned Judge, however, over-ruled both objections, and admitted the evidence, and the lessor of the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit on both points.

*D. F. Jones* now moved accordingly, and contended, first, upon the authority of *Doe* v. *Lea* (*a*), that the holding being from "*Lady-day*," must be taken to be according to the new style, especially as no custom of the country to the contrary was shewn, or indeed existed; and second, that as the holding was by deed, parol evidence was not admissible to shew that the verbal understanding of the parties was different to that expressed by themselves in the deed; and on this point he cited *Doe* v. *Benson* (*b*), but

PER CURIAM. Neither of these objections is tenable. As to the first, the defendant was to enter when his predecessor was to quit; that was at *Lady-day*; and it was proved, that the parties understood and intended that *Lady-day* should mean *old Lady-day*. As to the second, the tenancy here cannot be said to be by deed, because the

(*a*) 11 East, 312. (*b*) 4 B. & A. 588.

instrument is a mere written agreement, not under seal, and therefore upon the authority both of *Doe* v. *Benson*, and *Furby* v. *The Mayor of Canterbury* (a), the parol evidence was admissible. There is therefore no ground for this application.

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Rule refused.

(a) 1 Esp. 198. See also Adams on Ejectment, 129.



Doe, on the Demise of Ibbetson and Others v. Land.

*Wednesday, Nov. 12.*

It is not necessary to produce the original order for the discharge of an insolvent debtor, in order to prove the title of his assignee, to maintain ejectment, as such, under the 1 *Geo.* 4. c. 119. s. 4.

Ejectment for premises at *Askwith*, in the county of *York*. At the trial before *Bayley*, J. at the last *York* Assizes, the plaintiff, who sued as assignee of an insolvent debtor, in order to prove his title so to sue, put in evidence an office copy of the assignment of the insolvent's effects to himself, and a minute of the insolvent's discharge, copied from the entry in the proceedings of the insolvent court, and called the clerk of that court, who stated that the assignment was never, according to the practice of the court, made, until the proper order for the insolvent's discharge had been allowed. It was objected, for the defendant, that this evidence was insufficient, and that the plaintiff ought to have produced the proceedings of the court themselves, in order to prove the due discharge of the insolvent, without which the assignment would, by 1 *Geo.* 4. c. 119. s. 4. be void. The learned Judge over-ruled the objection, but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that the evidence was insufficient; and the plaintiff having obtained a verdict,

*D. F. Jones* now moved accordingly, and renewed the objection, contending, that as by the proviso in the act, the assignment would be void, unless the insolvent's discharge was proved, that fact ought to be established beyond doubt,

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and by the best possible evidence, which could only be by the production of the original order of the Court below, but,

PER CURIAM, the evidence in this case was primâ facie sufficient to support the plaintiff's title to sue; and if any doubt existed of the fact, it was for the defendant to impeach it. The proviso in the insolvent act is, that the assignment shall be void unless the insolvent obtains his discharge. The onus, therefore, of shewing that the insolvent was not regularly discharged, lay upon the defendant. The plaintiff had done all that could reasonably be required, and therefore there is no reason for disturbing the verdict.

Rule refused.

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*Thursday, Nov. 13.*

The KING v. The JUSTICES of the NORTH RIDING of YORKSHIRE.

At common law, prisoners committed to gaol for trial, and having no means of supporting themselves in the mean time, are not entitled to any maintenance at the public expence. The 19 *Car.* 2. c. 4. and 31 *Geo.* 3. c. 46, require the Justices to provide a stock of materials for the employment of such prisoners, and the 4 *Geo.* 3. c. 64, authorises the Justices to set such prisoners to work "with their own consent," in order to maintain themselves. Where a visiting Justice reported to the Sessions, as an abuse, that untried prisoners had been set to work on a machine, called the tread-mill, contrary to their own inclinations, and the Sessions thereupon ordered, that such mode of employment should be applied to other prisoners, as well as those sentenced to hard labor; and that those committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only :—Held, that mandamus would not lie to compel the Justices to order such prisoners any other food; and that in ordering even an allowance of bread and water, they had done more than they were by law bound to do.

SCARLETT (with whom was *Alexander*) moved for a rule to shew cause why a mandamus should not issue to the Justices of the Peace for the North Riding of *Yorkshire*, commanding them to take into consideration a report made by *Martin Stapylton*, Esq. respecting certain abuses in the House of Correction at *Northallerton*, and to take measures for rectifying the same. The affidavit upon which the motion was founded, stated, that Mr. *Stapylton*, being a magistrate for the North Riding of *Yorkshire*, on the 14th *October*, 1823, visited the House of Correction at

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*Northallerton* in his official capacity, and discovered that several prisoners who had been committed thereto previous to trial had been, contrary to their own inclinations, compelled to work upon the tread-mill; that thereupon he made a report in writing of these facts to the Justices in General Quarter Sessions assembled, and required them to take the same into consideration; that the Justices so assembled accordingly took the same into consideration, but instead of adopting measures to rectify the abuse, made an order, that the tread-mill should be applicable both as hard labor in the cases of such prisoners as might be sentenced thereto, and for the employment of other prisoners who were not able to work at any trade, or other employment; and also that persons committed for trial, who were able to work, and had the means of employment offered them by the visiting Justices, by which they might earn their support, but who should obstinately refuse to work, should be allowed bread and water only. The affidavit further stated, that bread and water, unaccompanied by any other article of food, did not afford sufficient nourishment for the purpose of sustaining human life, and that upon such diet the health of prisoners could not be preserved. Under these circumstances, the Court was called upon to grant a mandamus to compel the Justices to take measures for rectifying this abuse. [*Abbott*, C. J.—You admit that the Sessions have taken the report into consideration; can we then tell them what they are to do? Who are to judge what is proper to be done? this Court, or the Justices of the Peace, in whom the conservation of prison discipline is placed?] This is a matter of great importance, and if it appears to the Court that the Justices have violated the law, the Court will compel them to do what is right. It is submitted that it is contrary to law to compel untried prisoners to labor, whilst in custody previous to trial. By 4 *Geo.* 4. c. 64, "An act for consolidating and amending the laws relating to the building, repairing, and regulating of certain gaols and Houses of Correction in *England* and in *Wales*," it is enacted in sec. 17, "that it

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shall be lawful for any Justice, at his own free will and pleasure, and without being appointed a visitor, to enter into and examine any prison, at such time or times, and so often as he shall see fit, and if he shall discover any abuse therein, he is hereby required to report the same in writing, at the next Quarter Sessions, which abuse, so reported, shall be taken into immediate consideration by the Justices at such Quarter Sessions, at which such report shall be made, and they are hereby required to adopt the most effectual measures for inquiring into and rectifying such abuse, as soon as the nature of the case will allow." If, therefore, it appears that the Justices have not complied with the directions of this section, in rectifying the abuse reported, they may be compelled to do so by mandamus. Sec. 10 of the same statute shews what the law requires to be done on the subject in question. By that section certain rules and regulations are laid down, which are to be observed in all gaols; and by the 13th section it is provided, "That every prisoner maintained at the expence of any county, &c. shall be allowed a sufficient quantity of plain and wholesome food, to be regulated by the Justices in General or Quarter Sessions assembled, regard being had (so far as may relate to convicted prisoners) to the nature of the labor required from or performed by such prisoners, so that the allowance of food may be duly apportioned thereto; and it shall be lawful for the Justices to order for such prisoners of every description, as are not able to work, or being able, cannot procure employment sufficient to sustain themselves by their industry, or who may not be otherwise provided for, such allowance of food as the said Justices shall from time to time think necessary for the support of health." Then the 37th section points out in what cases prisoners committed for trial may be set to work:—"And whereas persons are often committed to prison for trial, who are willing to be employed in such work or labor as can be conveniently executed or done in the prison to which they are so committed; and it is fit that such persons should be so employed, rather than

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that they should be obliged to remain idle during their confinement; Be it enacted, that it shall be lawful for any one or more visiting Justice or Justices of any prison to which this act shall extend, to authorize, by an order in writing, the employment of any such prisoners, *with their own consent*, in any such work or labor; and it shall be lawful for the keeper of such prison to employ such prisoner in such work or labor accordingly, and to pay such prisoner any such wages, or portion of the same, and at such periods as shall be directed by such Justice or Justices; provided always, that it shall not be lawful to place together, on account of such employment, any prisoners who would otherwise be kept separate, under the provisions of this act." Taking, therefore the 10th and 37th sections together, it is manifest, first, that prisoners who are merely committed for trial, and have not the means of supporting themselves in prison, are to be provided by the county with a sufficient quantity of plain and wholesome food; and, second, that the Justices have no power to compel such prisoners to work at the tread-mill, or any other mode of employment, *unless with their own consent*. Whatever may be the expediency or policy of employing persons who are merely committed to prison in order to take their trial, it is contrary to the first principles of law and justice to compel an innocent man (for so the law considers him until he is proved guilty) to undergo the punishment of hard labor, in like manner as if he had been a convicted offender. It is clear that the statute now under consideration, does not sanction this principle. If not, then the order which the Justices have made is unlawful, and this Court will compel them to rectify the abuse. The necessary effect of the order is to compel untried prisoners to work against their own inclinations, with this alternative, that if they do not they shall have bread and water only. The order, it is true, does not say they shall be employed on the tread mill; but if they are incapable of any other work, they must be placed on the tread-mill, or be content with a species of food which it is

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sworn is insufficient for the sustentation of human life. The 10th section declares, that every prisoner maintained at the expence of the county, shall be allowed a sufficient quantity of "plain and wholesome food." This must mean such quantity and description as is sufficient for the preservation of health. It is sworn, that bread and water is not wholesome food, that is, it is not alone sufficient to sustain human life and health. The question then is, whether an untried prisoner shall be compelled to work against his inclination, or be forced to exist on bread and water only. Suppose the case of a poor man, with no means of supporting himself, who is cast into prison for a crime of which he is only suspected, and being thus restrained of his liberty, is he to be compelled to work at the tread-mill against his inclination; and if he refuses, is he to starve on bread and water? By this statute, the county is bound to find such prisoners a sufficient quantity of plain and wholesome food, without regard to the circumstance of their being, or not being, employed to earn their own maintenance. Bread and water is either insufficient or unwholesome, as it respects the preservation of health. [*Abbott*, C. J. Who is to judge what is wholesome and sufficient food? The question really comes to that.] That is a question of fact. [*Abbott*, C. J.—But who is to decide upon it? Is not that the province of the visiting Justices? *Bayley*, J.—Does your affidavit state any instances in which a diet of bread and water has had any prejudicial effect upon the health of the prisoners?] None, certainly, are mentioned, but it is perfectly notorious, that many of the diseases afflicting the laboring classes, result from a too sparing diet; and it is sworn here, that bread and water, unaccompanied with other articles of food, do not produce sufficient nourishment for the preservation of health. [*Abbott*, C. J.—Can you refer us to any act of parliament which makes it compulsory on the county to provide any food for prisoners committed for trial? *Best*, J.—The statute 19 *Car.* 2. c. 4, was passed for the purpose of enabling Justices to provide materials for setting prisoners

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to work, in order to maintain themselves. The preamble of that act shews clearly, that prior to that time, the county was not bound to provide food to prisoners committed for trial. *Abbott*, C. J.—From the 4 *Geo.* 4, it is by no means clear, that it is compulsory on the county to provide any food for untried prisoners. Section 10 declares, that there shall be certain regulations, which are afterwards set forth. The 13th regulation upon which reliance is placed, merely says, that "every prisoner maintained," i. e. "every prisoner who *is* maintained, shall be allowed a sufficient quantity of plain and wholesome food, regard being had to the nature of the labor required or performed by such prisoner," &c. It does not direct that *every* prisoner shall be allowed plain and wholesome food, but merely that those prisoners who are maintained, shall have the allowance. That raises a doubt in my mind, whether every prisoner is entitled to support, unless he is not able to work, or being able cannot procure sufficient to sustain himself by industry. I find nothing here which says that he must be maintained at all events, without regard to ill health, or want of employment.] The only statutes bearing upon this point are 19 *Car.* 2. c. 4, 31 *Geo.* 3. c. 46. s. 13, and 4 *Geo.* 4. c. 64. [*Abbott*, C. J. The 31 *Geo.* 3. c. 46. s. 13, only extends the provisions of the 19 *Car.* 2. c. 4, but it does not contain any compulsory provision for the maintenance of prisoners, in idleness, before trial.] Certainly no statute can be found which shews that an untried prisoner shall be maintained at the county expence.

Abbott, C. J.—The Court have been anxious to ascertain whether there is any act of the legislature which renders it compulsory on the county to feed a man in prison who can, but will not work for the purpose of maintaining himself. At present there does not appear to be any such legislative provision, and if there be not, the Court cannot grant a mandamus to the Justices to do that which by law they are not bound to do. It is clear, that none of the

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statutes to which we have been referred, impose this obligation. The preamble of the 19 *Car.* 2. c. 4, recites, that before the passing of that statute, there was not any sufficient provision made for the relief and setting on work of poor and needy persons committed to gaol for felony and other misdemeanors, and that they many times perished before their trial; and that the poor living there, idly and unemployed, became debauched, and came forth instructed in the practices of thievery and lewdness. That statute then, enabled the Justices at Sessions to provide a stock of materials out of the county rate, for setting on work poor prisoners, and to bestow the profits arising from such labor, towards their relief. The 31 *Geo.* 3. c. 46. s. 12, extends the provisions of 19 *Car.* 2, to all prisoners whatever, within the gaols, who may be inclined and willing to work; and by the recital in s. 13, it appears that even at that time the prisoners were so frequently afflicted by want of necessary food, as to render them incapable of earning their livelihood when released, and therefore it was enacted, that the Justices at Sessions might order money to be paid out of the county rate, towards assisting prisoners of every description, who are not able to work, or who, being able, cannot obtain employment sufficient to sustain themselves by their industry. From these statutes it is manifest, that prior to the recent act of the 4 *Geo.* 4, there was no legislative provision which made it compulsory on the county to feed a man who is able, but unwilling to work; and that is the point to which we are to look. It is equally obvious, that the 4 *Geo.* 4, does not cast this burthen on the public. There being therefore no legislative provision which compels the county to provide food for those who are able, but refuse to work, we cannot grant a mandamus to compel the justices to order any species of food to be provided for such prisoners. We cannot take upon ourselves to say, from the facts before us, that the labor of the tread-mill is not a proper species of work at which a man may earn his bread; and not being able to find any legislative provision which requires the public to main-

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tain a man who refuses to work when work is proposed for his performance, I see nothing illegal in saying that he shall have only bread and water. I see nothing contrary to law in this; and not being in disobedience of any legislative provision, we cannot infer that the magistrates have exceeded their jurisdiction. We ought on every occasion to be exceedingly careful how we interfere with the jurisdiction of the magistrates. The legislature has allowed a discretion to be exercised by them, as to the management of the prisons within their jurisdiction. That discretion is most properly vested in them, and does not belong to this Court to exercise. We must see plainly that they have disregarded some duty imposed upon them by law, before this Court can interpose, or do any thing to prevent the proper exercise of their discretion. After the legislature has vested this discretion in them, I cannot take upon myself to interfere in a matter on which they are called upon exclusively to decide.

Bayley, J.—We cannot grant a mandamus to the Justices, unless we see distinctly that they have violated their duty. Now, if there be an act of parliament which says, that persons who are capable of maintaining themselves by industry, but will not work, shall have no specific description of support at the expence of the public, we cannot say that the Justices who have ordered them bread and water only, have violated their duty. Here the Justices have ordered the prisoners more than they were bound to do by law.

Best, J. (a).—It is impossible to grant a mandamus in this case, because the 4 *Geo.* 4, says, in terms, that it is for the magistrates, in their discretion, to say what is the proper food to be allowed to the prisoners. If, therefore, the magistrates were bound to allow to an idle man any food at all, they would have to exercise their discretion in

(a) *Holroyd*, J. was in the Bail Court.

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saying what the food should be; and we could not direct them as to the manner in which their discretion ought to be exercised. If the law imposes a certain duty upon the magistrates, and they omit to perform it, we may set them in motion. But that is not the case here, for the magistrates have not only exercised their discretion in this matter, but they have already done more than we could order them to do; namely, in allowing bread and water to persons who have no claim by law upon public allowance. It appears to me, that the legislature did not mean to place a man in prison in a better situation than the man who is at liberty. He may be placed in as good a situation, but I see no reason why he should be placed in a better. A poor man, out of prison, is only entitled, by the poor laws, to be maintained, if he is able to work, and it is only when he is unable to work that he is to be maintained by the public at all events. If he is able to do work, but can get none, he is to have work found for him; but if he says he will not work, I know of no law which says that he is to be maintained in idleness. Is a man in gaol to be in a better situation? Being in gaol, certainly he cannot so easily find work as a man at large, but the Justices are to find work for him, and afford him the means of earning his livelihood by honest industry. According to 19 *Car.* 2. c. 4, the magistrates are bound to afford him the means of maintaining himself, and nothing more, and if from obstinate and incorrigible indolence, he refuses to work, he must take the consequences upon himself. The magistrates in that case are not bound to supply him with food, and maintain him in idleness. I cannot but think that wholesome bread with water is sufficient food for a person who will not do any work; and I am afraid that it has often happened that poor persons out of prison, and who are disposed to work and support themselves by honest industry, have not the same comfortable means of living as the Justices in this case seem disposed to afford these idle prisoners. However, whether the quantity or quality of the food be or be not sufficient, is not a

matter for us to decide upon. The Justices alone are to judge of that, and having exercised the discretion vested in them by law, we cannot interfere in the manner now proposed.

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*Scarlett.* It is to be distinctly understood as the decision of the Court, that prisoners committed for trial, and who are determined not to work for their own livelihood, are not entitled to support from the county?

Abbott, C. J.—As yet nothing like a legislative provision has been adduced to us, which renders it compulsory on the Justices to maintain any prisoner in idleness. The statutes brought under our consideration, contain only provisions requiring the county to find prisoners the means of employment.

Best, J.—It is clear that the common law has made no provision for maintaining prisoners in idleness, and the preamble of the 19 *Car.* 2. c. 4, is a legislative declaration of the mischievous consequences resulting from poor persons in prison being kept in a state of idleness.

Rule refused.

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## Blizard *v.* Kelly.

*Tuesday, Nov.* 13.

In an action for slander, after several counts setting out the words, the fifth count charged, "that the defendant had wrongfully and without any reasonable or probable cause *imposed the crime of felony upon the plaintiff.*" On a motion in arrest of judgment:—Held, that such a count is good, after verdict.

THIS was an action of slander. The first three counts were for words, importing that the plaintiff had feloniously received stolen goods; the fourth count was similar, with the addition, that defendant had, before a Justice, charged plaintiff with concealing stolen goods; and the fifth stated, "that the defendant had wrongfully, and without reasonable or probable cause *imposed the crime of felony upon the*

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*plaintiff*." Plea, not Guilty, and issue thereon. At the trial, before *Park*, J., at the last Assizes for *Gloucestershire*, the plaintiff had a verdict for 200*l*. damages upon the whole declaration.

*W. E. Taunton* now moved for a rule nisi to arrest the judgment on the ground that the fifth count was bad. That count states, that the defendant wrongfully imposed the crime of felony upon the plaintiff. Now, unless the nature of the act done is specifically stated, these words have no intelligible meaning. They are indefinite and uncertain. [*Bayley*, J. There are many instances of a count in that form. In an anonymous case in *Ventris*(*a*), it is said, that an action on the case lies, "quia crimen feloniæ imposuit" generally, without saying what felony.—*Holroyd*, J. In 1 *Roll. Abr.* 68. *lib.* 10, it is held to be good.—*Abbott*, C. J. Whilst pleadings were in the *Latin* language it would clearly be good. The words in present use are a bad translation of the words "crimen feloniæ imposuit;" the legal sense and meaning of which words is, that the defendant made a charge of felony before a magistrate.] The case of *Cook* v. *Cox* (*b*), is an authority to shew that in a declaration for slander of plaintiff, in his trade, a count alleging that defendant in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged and asserted, and accused plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, is insufficient, and the judgment was arrested. This is an authority expressly in point, and if the count in the present case is held good, it must have the effect of overturning the decision referred to. [*Abbott*, C. J. This count would clearly be good upon evidence that the defendant preferred a charge of felony against the plaintiff before a magistrate. An act must be shewn to have been done, in order to support the count.] The nature of the act done must be stated on the record, as in an action for words, in which the

(*a*) 1 Vent. 264. (*b*) 3 M. & S. 110.

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very words must be stated. The reason for this precision is obvious. If the plaintiff recovered damages upon a count so defectively framed as this, he might afterwards maintain an action for the specific words used, and then judgment in this action could not be pleaded in bar. In the case of *Pippett* v. *Hearn* (a), a distinction was taken between felony and perjury, and therefore it was held, after verdict, that a count charging generally that the defendant had maliciously indicted the plaintiff for wilful and corrupt perjury, was sufficient, but inasmuch as a charge of felony was uncertain, without stating what the felony was, the Court seemed to think that a count framed in that general form would not be good.

PER CURIAM (b).—After verdict this count is clearly good. This is a very old form, and may be found in several precedent books (c). The case from 1 *Ventris*. 264, is a direct authority. If the *Latin* words had been used, there could be no doubt that a count so framed would be good. The words now in use are an imperfect translation of the words "crimen feloniæ imposuit." In a legal sense those words import that the party made a charge of felony before a Justice of the peace. Undoubtedly, in support of such a count, it would not be sufficient to shew mere words used by the party in conversation importing that he the plaintiff had been charged with felony. Some act must be shewn to have been done, as that the defendant went before a magistrate, and preferred a charge of felony against the plaintiff. The omission to state in the count what specific felony was charged upon the plaintiff, is at all events cured by the verdict.

Rule refused (d).

(a) Ante, vol. i. 266.

(b) *Best*, J. was absent.

(c) *R. Bayly*, amicus curiæ, mentioned that he had such a form in his precedent book, and added, that he had a note of a case taken by *Gibbs*, C. J. in E. T. 1782, in which such a count was held sufficient after verdict.

(d) Vide *Davis* v. *Noak*, 1 Stark. N. P. C. 377.

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Thursday, Nov. 13.

## COLLEY and Another v. STREETON.

An instrument, not under seal, whereby *A.* agrees to let, and *B.* agrees to take and rent certain premises, to hold *henceforth* for a term of thirty-four years, determinable by either party on giving twelve months notice, at the end of the first seven, fourteen, or twenty-eight years at a certain yearly rent, clear of all taxes; and *B.* binds himself to keep the premises in tenantable repair during the term, with a further agreement on the part of *A.*, to grant a lease on the like terms, with usual covenants within three months, is not a lease, though it contain words of present contract.

A tenant holding under a special agreement (which is to be the basis of a future lease), containing several obligations, one of which is, to keep the premises in tenantable repair, may be sued in assumpsit generally for not repairing, without setting out the special agreement. Under a count, "that defendant became tenant of premises, and in consideration thereof, undertook to repair;" the special agreement may be given in evidence to prove the fact of a tenancy as the consideration for the promise to repair.

Lessee bound by covenant to repair, under-lets part of the demised premises, with a like obligation by his tenant to repair within three months after notice for that purpose. The premises under-let becoming out of repair, the superior landlord gives notice to his immediate tenant, to repair, at the peril of forfeiting his lease. Under-tenant, after notice, neglects to repair within three months; whereupon lessee, to avoid a forfeiture of his whole estate, enters, and puts the premises in tenantable repair:—Held, that his under-tenant was liable to him for the whole expence so incurred, although the former had sold his interest in the premises to a purchaser, who had entirely re-built them, before action brought.

ASSUMPSIT. The first count of the declaration stated, that by a certain memorandum of agreement in writing, sealed with the seals of the defendants, made 25th *July*, 1816, between the plaintiffs of the one part, and the defendants, assignees of one *Crane*, a bankrupt, of the other part, reciting, that by an agreement under the hand of one *Peacock* of the one part, and *Crane* of the other part, dated 29th *March*, 1796, *Peacock* agreed to let unto, and *Crane* agreed to take and rent of *Peacock* certain premises therein mentioned for thirty-four years, at the annual rent of 40*l.*; and that *Crane* thereby agreed to keep the same premises in good and tenantable repair during the said term, and that *Peacock* thereby agreed to grant a lease on the same terms to *Crane*, with the usual covenants within three calendar months, and that *Crane* agreed to execute a counterpart thereof; reciting also, that *Peacock* had procured a lease to be granted to him of the said premises, together with others, by indenture bearing date 21st *January*, 1802, for a longer period than that agreed by him to be granted as before-mentioned; reciting also, that *Peacock* afterwards granted an under-lease of all the said premises for nearly the whole of his term therein, unto two persons, naming them,

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subject to the said agreement with *Crane*, and that the same under-lease afterwards became vested in the plaintiffs; reciting also, that the defendants, as assignees as aforesaid, were entitled to the benefit of the said agreement entered into with *Crane*; that the said plaintiffs did agree with the said defendants, that they would, on or before the 9th *September* then next, demise and lease unto the defendants all the premises by the said agreement of the 29th *March*, 1796, agreed to be demised, for the residue which should then be to come of the said term of thirty-four years; that the defendants did thereby agree that they would accept such lease and execute a counter-part; and that it was mutually agreed, that in the said lease there should a covenant that the lessees should pay the rent, and keep and preserve the premises in sufficient and tenantable repair; and that it should be lawful for the plaintiffs to enter and view the same during the continuance of the said term, and of all want of repair give notice at the premises; and that the lessees would make good the same within three calendar months after such notice; and that there was to be a clause of re-entry for breach of any of the covenants in such lease; and thereupon afterwards, in consideration that the plaintiffs would permit and suffer the defendants to hold and enjoy the said premises before such lease should be made, upon the terms which by the said memorandum of agreement were to be contained in such lease, the defendants undertook to do and perform all such things as it was agreed that there should be covenants for the lessees to do and perform. The declaration then averred, that the said plaintiffs did, before any lease was made, namely, from the day and year first mentioned, until the commencement of this action, suffer the defendants to occupy as aforesaid, yet the defendants, during all that time, suffered the premises to be out of repair; that plaintiffs entered and viewed the premises, and on 17th *October*, in the year first aforesaid, gave the defendants notice of the want of repair, but that they did not repair within three calendar months, by reason whereof the plaintiffs were

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obliged to lay out a large sum of money in repairing the premises. The second count stated, that on, &c. in consideration that the defendants, at their request, had before that time become, and then were, tenants to the plaintiffs of certain premises, they undertook to keep the same in good and tenantable repair; averment that they did not do so, whereby the plaintiffs were obliged to lay out a large sum of money in repairs. The third count was, in substance, the same as the second, to which were added the common money counts. The defendants pleaded the general issue, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the plaintiffs produced in evidence the agreement, dated 25th *July*, 1816, upon which the first count of the declaration was founded. It was immediately objected, on the part of the defendants, that the instrument dated 29th *March*, 1796, recited in the agreement of 25th *July*, 1816, was in effect a lease to *Crane*, the bankrupt, and inasmuch as it subsisted at the time of the agreement with the defendants in 1816, the consideration for the promise averred in the first count was improperly stated, by reason that the cause of action arose out of the first-mentioned instrument. The Lord Chief Justice, however, said it was unnecessary to consider whether the first count of the declaration could or could not be sustained for the objection stated, because the second and third counts were framed generally upon an assumpsit to keep the premises in repair, in consideration of a tenancy. Two other instruments were then given in evidence by the plaintiffs; first, a lease to *Peacock*, which contained amongst other covenants, a covenant by him to repair, and a clause of re-entry for any breach of covenant; and, second, an under-lease with similar covenants, which was granted by him to two other persons, and which afterwards became vested in the plaintiffs. It was then proved, that on the 28th *September*, 1816, the plaintiffs' superior landlord gave them notice to repair the premises in question, which had become dilapidated. It further appeared,

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that on the 17th *October* following the plaintiff served a notice on the defendant's attorney, requiring that the premises should be repaired. In answer to this requisition, the attorney stated, that the defendants were about to sell the premises, and requested that they might not be urged to do any repairs until after the sale. Repeated applications were afterwards made by the plaintiffs to the defendants, requiring them to repair; and notice was given, that unless by a day specified, they did what was necessary to prevent the premises from falling to decay, they would send their own workmen to do it. No steps were taken for this purpose, and accordingly the plaintiffs, on the 19th *March*, 1817, sent their own workmen to put the premises into tenantable repair. The expence incurred by plaintiffs, amounted to 228*l*. Several witnesses proved that this sum was reasonable, and no more than requisite to do what was necessary to the premises. It did not appear that the defendants had ever expressed their assent to what was done by the plaintiffs, but it was proved that they knew the premises were undergoing repairs at the instance of the plaintiffs, and they expressed no dissent until the plaintiffs had incurred the expence above-mentioned. After the premises were completely repaired, the defendants sold them to a person named *Hart*, who pulled down the old buildings and rebuilt them prior to the commencement of this action. It was objected for the defendants, first, that as the repairs had been done without their consent, and indeed by the tortious obtrusion of the plaintiffs upon the premises, the defendants were not liable; and second, that at all events the plaintiffs could only recover nominal damages, inasmuch as the premises were completely rebuilt before action brought. Evidence was also adduced to shew, that the plaintiffs had expended more money on the premises than was necessary to put them in tenantable repair. The Lord Chief Justice, in his charge to the Jury, said, it was perfectly indifferent whether the action was founded on the contract of *March*, 1796, or that of *June*, 1816, because in each there was a stipula-

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tion on the part of the tenant, to keep the premises in repair; that the plaintiffs had a right to have them kept in repair at all times, in order that he might not loose his whole estate, which he might have forfeited to the superior landlord, for a breach of the covenant to repair, and for that purpose to enter and do the repairs: And although the plaintiffs might be trespassers in making such an entry, yet it would not prevent them from recovering. His Lordship was also of opinion, that the subsequent re-building of the premises would not deprive the plaintiffs of the right to recover the money they had expended, but it was for the Jury to determine whether the sum expended was reasonable and proper under all the circumstances. The Jury found their verdict for the plaintiff, damages 228*l.*

*Wilde* now moved for a rule nisi for a new trial, on two grounds, first, for a variance between the evidence, and the declaration; and second for misdirection as to the amount of damages. The first count of the declaration is upon a promise to occupy the premises according to the terms of an agreement for a lease; the second and third are by landlord against tenant, for not repairing. All these counts rest upon a promise to repair, implied from certain circumstances. On the 29th *March*, 1796, an agreement was entered into between *Peacock*, the landlord of the premises, under whom the plaintiffs claim, and *Crane* the bankrupt, whom the defendants represent, as assignees. The first question is, as to the effect of that instrument, whether it amounts to a lease, or only an agreement for a lease. In the year 1816, the plaintiffs had become possessed of *Peacock*'s interest in the premises, and in the same year, *Crane* became a bankrupt; and on the 25th *July*, in that year, another agreement was executed between the plaintiffs and the defendants. If the instrument of 1796 be a lease between the parties under whom the plaintiffs and defendants respectively claim, then it must be considered as a subsisting lease at the time when the agreement of 1816 was entered

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into, and consequently, in point of law, the defendants' obligation to repair arose out of that instrument. It follows, therefore, that the consideration stated in the first count of the declaration, fails in proof. The consideration for the promise stated in the first count is, that the plaintiff would permit and suffer the defendants to occupy the premises until a lease should be granted; but if the defendants were occupying under an existing term, then the whole consideration for the promise on which the action was founded, completely fails. The declaration assumes to rest upon a promise which it was unnecessary to state, inasmuch as the plaintiffs' title to, and the defendants' right to occupy the premises, were respectively derived from a pre-existing lease. The test as to what is and what is not a lease, is distinctly laid down in *Bac. Abr.* tit. Lease [K.]. "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, such words whether they run in the form of licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years." Now, according to this definition, the instrument in question is clearly a lease. It is to the following effect:—"*J. Peacock* doth agree to let unto the said *S. Crane*, and the said *S. Crane* doth agree to take and rent all the said premises, to hold from henceforth for the term of thirty-four years, determinable by either party, on giving twelve months notice at the end of the first seven, fourteen, or twenty eight-years, at and under the yearly rent of 40*l.* clear of all taxes; and the said *S. Crane* binds himself to keep the said premises in good and tenantable repair, &c." [*Abbott*, C. J. Assuming this to be a lease, and that the first count failed in proof, is there not evidence in the cause which will sustain the second and third counts?] Those counts are clearly objectionable, because they assume to rest upon an implied promise, whereas the promise was express, and contained in an instrument embracing several conditions, all of which combined, consti-

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tuted the consideration for the premises, and ought to have been specially declared upon. [*Abbott*, C. J. The instrument which you call a lease is not under seal; it is only evidence of a continuing promise to the persons in whom the reversion may from time to time be vested. *Bayley*, J. There are many cases since the authority cited in *Bacon's Abridgment*, which shew, that no words of present demise will constitute a lease, if the term is to commence at a distant period, although the party has intermediate possession. An instrument so framed is no more than an agreement that there shall be a lease. *Holroyd*, J. In *Goodtitle* v. *Way* (a), it was held, that a paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself. The instrument referred to, amounts to no more than an agreement, and world be good evidence to support the second and third counts. If the defendants occupied under that agreement, they were bound by its terms, and it was unnecessary to set out the whole in the declaration. It is the tenancy which imposes upon the defendants the obligation to repair. Those counts are founded upon the fact of a tenancy, and the agreement is good evidence to sustain that fact, and establish the consideration for the promise to keep the premises in repair. By law the defendants, as tenants, were bound to keep the premises in repair.] Admitting then, that the plaintiffs have made out a case for a verdict, it is quite clear that they were only entitled to nominal damages under the circumstances proved in evidence. It was proved, that the plaintiffs had obtruded themselves upon the premises, without the defendants' consent, for the purpose of doing the repairs in question. This was a voluntary act on their part, and they ought not now to impose upon the defendants an expence which they were under no obligation of incurring. The right to recover damages must stand precisely as it

(a) 1 T. R. 735.

would have stood, if they had not so obtruded themselves, and expended that sum of money. But independently of this, it was proved, that the premises were completely re-built before action brought, and consequently they could not have recovered more than nominal damages, had they not of their own wrong obtruded themselves into the premises, and voluntarily laid out the money. In the month of *May*, 1817, the premises are out of repair, and in 1823, the action is tried for the breach of an agreement for not repairing, and at the time of trial, it is proved that the premises are then completely re-built. Under such circumstances, the plaintiffs could only be entitled to nominal damages, they having the full benefit of what had been since done to the premises. If, instead of repairing the premises themselves, they had brought an action against the defendants upon the agreement, and it appeared at the time of the trial, that the premises had been completely re-built, it is quite obvious that they could only recover nominal damages. Are they now to be placed in a better situation, when the expence was incurred, without the consent of the defendants, and who ought not to be affected by the unauthorised act of the plaintiffs. For these reasons the damages were excessive, and the defendants are entitled to a new trial.

ABBOTT, C. J.—It appeared at the trial, that the plaintiffs held the premises in question, together with other premises, by lease granted to a person under whom the defendants claim. The premises which are the subject of this action, had been separated by an under-lease made by a predecessor of the plaintiff. The superior landlord had called upon the plaintiff to repair that part of the premises which was in the occupation of the defendants, and gave him to understand, that if he did not do so, he would bring an ejectment for the whole. Having been thus threatened, and being under the peril of a forfeiture of the whole, notice was given to the defendants on the 17th *October*, 1816,

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to repair. They however, did nothing. The premises were then unoccupied. In *August*, 1816, the defendants had put them up to auction, but bought them in, and placed a man there to keep possession. Nothing being done to the premises, the plaintiffs' attorney called upon the defendants' attorney several times, about putting them in repair. On one of these occasions the defendant's attorney said that the assignees wished the matter to stand over till after the sale. The plaintiffs' attorney told him the situation in which the plaintiffs were, and that they were threatened by the ground landlord with an ejectment for a forfeiture. Notice was then served upon the defendants, that if the necessary repairs were not done by a day specified, the plaintiffs would themselves send their own workmen. This notice did not produce the desired effect. Under these circumstances, the plaintiffs, in order to prevent a forfeiture, set about repairing the premises themselves. They had gone on repairing until they had expended a sum of 228*l.* 13*s.* 3*d.* In the mean time it came to the knowledge of the defendants, that the repairs were going on, and having laid their heads together, they thought it best to prevent the plaintiffs from going on, and they turned the workmen off the premises. This is the substance of the facts proved. Witnesses were called by the plaintiffs to prove that nothing more was done than was necessary to put the premises in tenantable repair. On the other hand, the defendants called witnesses to shew that a much less sum would have been sufficient for that purpose. I told the Jury, that it seemed to be a matter of perfect indifference whether the action was founded on the agreement executed in 1796, or on that in 1816, because in each of those instruments there was a stipulation on the part of the tenant to repair. I told them further, that for the purpose of the present case, it seemed to me unnecessary to consider whether the repairs were done with the assent of the defendants or not, because if not done with their assent, the plaintiffs would have been trespassers, and the defendants might have brought an action for such da-

mages as a Jury would give them under the circumstances. I told the Jury that the plaintiffs were under an obligation to have these premises kept in a proper state of repair, in order that they might not be subjected to a forfeiture of their whole estate. The defendants had received notice to repair, but they disregarded it. I told them further, that as landlords, the plaintiffs had a right to have the premises kept in repair at all times, because the value of the reversion depended upon the state of repair in which the premises were at the time of sale. I then told them that the question that they had to consider was, whether the sum demanded by the plaintiffs was a reasonable and proper sum for putting the premises into repair; if they thought the whole sum expended was fit and proper, they ought to find for the plaintiff to the full amount; but if on the other hand they thought the sum too large, they might give such damages as seemed to be just and proper. They found their verdict for the whole sum, and I see no reason to be dissatisfied with their verdict.

Bayley, J.—It appears to me, that this case is free from all doubt. The defendants held these premises under an obligation to keep them in repair from time to time; they did not perform their contract, and the plaintiffs are entitled to recover something. What damages are they properly entitled to recover? Such damages as they had themselves sustained. What were the damages which the plaintiffs had sustained? Certain premises in which they had an interest, are out of repair; they receive notice from the person under whom they hold, that they must repair, with an intimation, that if they do not, he will go for a forfeiture; this is communicated to the defendants' attorney, and they are required to comply with the terms of their agreement; they do not do so, and the plaintiffs, in order to guard against a forfeiture of the whole estate, go to the premises and do that which is most reasonable they should do. It is said that the plaintiffs are only entitled to nominal damages,

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because the premises were afterwards re-built by some other person. I agree with Mr. *Wilde*, that if the plaintiffs had not expended any money on the premises, but had suffered them to remain in the same state, and the defendants afterwards sold them, and the vendee had re-built them, the plaintiffs would then have been entitled to recover only nominal damages, because nominal damages would have been the extent of the injury they had sustained. But the state of facts in evidence is very different from that. The measure of the plaintiffs' damages is the extent to which they have been injured. They were put to the expence of 228*l.* in doing necessary repairs, and to that extent they had a right to recover.

HOLROYD, J.—I am of opinion that the plaintiffs were entitled to recover back the amount of any expence which they had incurred in doing necessary repairs to the premises in question under the circumstances of this case. It is clear that they sustained a loss to the amount of 228*l.* in doing those repairs which the defendants were bound to do. I think the plaintiffs had a right to enter the premises in question without ejectment, in order to do all legal acts, being liable to a forfeiture if they had not done so. If they had themselves entered for a forfeiture, they would be entitled to repair; and in consequence of the defendants not repairing upon request, I think the entry of the plaintiffs for the purpose of doing that which the defendants were bound to do, was justifiable. Admitting this to be questionable, it appears to me that at the utmost the plaintiffs were only liable to an action of trespass for the damages which such an entry would have occasioned; but that would not prevent their recovering the money which they had expended in doing those repairs which the defendants were bound to do, and which, if not done, would have subjected the plaintiffs to a forfeiture. Supposing the premises had not been afterwards pulled down and re-built, there could be no doubt that the plaintiffs would be entitled to recover

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the 228*l.*; and I do not see how the circumstance of the premises having been re-built, can make any difference in the case. The plaintiffs have sustained a positive damage by the default of the defendants, and to the amount of that damage they have a right to a verdict.

BEST, J.—I think this is one of the plainest cases ever submitted to a Court of Law. The plaintiffs have expended 228*l.* in repairs, which the defendants ought to have done to these premises. It is said, the plaintiffs are not entitled to be indemnified, because the old premises have been pulled down and re-built. It may be true that they have new premises substituted, but that will not lessen the damage they have sustained in repairing the old buildings whilst they subsisted. Surely they are entitled to have the money back which they have so expended. The reasonableness of the sum expended was left distinctly to the Jury.

Rule refused.

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*Thursday, Nov.* 13.

Defendant having been arrested on 27th *March*, on a writ returnable the 16th *April*, became bankrupt on 3d *April*, and obtained his certificate on 26th *June*: Held, that as the bankruptcy took place before the bail bond was forfeited, the debt was proveable under the commission, and consequently the bail were discharged.

ON shewing cause against a rule for staying proceedings on the bail bond, the facts were these:—On the 28th *February*, a writ returnable the last return of *Easter*, i. e. 16th *April*, was issued to arrest the defendant for a debt of 27*l.* On the 27th *March*, he was arrested and gave a bail bond; on the 3d *April* a commission of bankrupt issued against him, and on the 26th *June*, he obtained his certificate. Process issued on the bail bond on the 7th *June*, and the question was, whether the certificate did not discharge the defendant as to this action, bail not having been perfected. The answer was, that the bankruptcy having taken place before the bail bond was forfeited, the debt was proveable under the commission, and the case of *Dinsdale* v. *Evans* (*a*), was cited as an authority in point.

(*a*) 4 J. B. Moore, 350.

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The COURT were of this opinion, and observed that the laches of the plaintiff, in laying by so long after the return of the writ, had probably lulled the defendant, who, had the sheriff been ruled to return the writ, or bring in the body, might have rendered in discharge of his bail. On payment of costs the rule ought to be made absolute.

Rule absolute.

*Chitty*, for the plaintiff, and *Abraham*, for the defendant.

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*Friday, Nov.* 14.

## DRAYTON and Another *v.* DALE.

Property acquired by an uncertificated bankrupt after bankruptcy does not absolutely vest in his assignees by virtue of the assignment, although they may claim it; but if they remain passive, and do not interfere, he has a right to such property against all other persons.

Where a debtor of an uncertificated bankrupt made a promissory note payable to the bankrupt, "or his order," in discharge of a debt contracted before bankruptcy, and the bankrupt indorsed it for a bonâ fide debt to *A.* who indorsed it to *B.* for valuable consideration, and *B.* sued the maker:—Held, first, that the maker, by the terms of his note, was estopped from saying that the bankrupt had no authority to indorse; and, second, that the assent of the assignees was not necessary to enable the bankrupt to negotiate the note by indorsement.

THIS was an action of assumpsit by the indorsees against the maker of a promissory note, dated 22d *September*, 1818, for 50*l.* value received, payable twenty-four months after date, to one *Gauntlett Clarke*, "or his order," and by said *Clarke*, indorsed to Messrs. *Knight* and *Freeman*, and by them indorsed to the plaintiffs. Plea, first, the general issue—Non-assumpsit, and, second, the bankruptcy of the said *Gauntlett Clarke* and one *George Whitehead*, the younger, by virtue of a commission of bankruptcy, dated and issued 19th *November*, 1814, and an assignment thereupon by the commissioners to Messrs. *Gibson*, *Wilson*, and *Howell*, dated 1st *December*, 1814, by reason of which, and by force of the statute in such case made and provided, the interest, title, and right to indorse the said promissory in the declaration mentioned, before and at the time of the said indorsement of *G. Clarke*, became and was vested in the said assignees, and not in the said *G. Clarke*, and whereby the indorsement of *G. Clarke* became void, and created

no right in the plaintiffs to sue. The plaintiffs took issue on the first plea, and replied to the second, that after the assignment to the assignees, the indorsement of *Clarke* was made by him by and with the consent of the said assignees. The defendant rejoined, and denied such consent, and thereupon issue was joined. At the trial, before *Abbott*, C. J. at the *London* adjourned Sittings after *Hilary* Term, 1821, a verdict was entered for the plaintiffs; damages 51*l.* 10*s.* subject to the opinion of this Court, on a case.

The case stated, that a joint commission of bankrupt had issued against *Clarke* and *Whitehead*, dated 19th *November*, 1814, that an assignment of the bankrupt's estate had taken place as in the special plea mentioned, and that *Clarke* did not obtain his certificate until *September*, 1822. At the time of issuing the commission, the defendant was indebted to *Clarke*'s separate estate in a considerable sum above the amount of the debt in question. The assignees executed a power of attorney to *Clarke*, dated 29th *August*, 1815, whereby they authorised him to collect debts, sue in their names, and do other acts for the benefit of the estate. Mr. *Wilson* was a creditor of the separate estate of *Clarke*, and was the acting assignee. The other two assignees were not creditors. Mr. *Wilson* urged *Clarke* to obtain payment of his debt from the defendant, and *Clarke* frequently applied accordingly for payment, but without success. At length *Wilson* told *Clarke* he should insist upon proceeding against the defendant unless it was settled, upon which *Clarke* told *Wilson* that as he *Clarke*, was conducting the affairs of the concern, he would, with *Wilson*'s permission, take that debt upon himself, as *Dale* had assured him that he should be ruined if pressed to pay the money; and *Wilson* assented to that proposal. *Clarke* informed the defendant of this arrangement, and the defendant gave the promissory note in question in part payment of his debt; *Clarke* indorsed it to Messrs. *Knight* and *Freeman*, to whom he was indebted, and they indorsed it to the plaintiffs, who gave them a cheque for the amount. Neither

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*Knight* and *Freeman*, nor the plaintiffs, knew the circumstances under which the note was given. It did not appear that either of the other assignees was informed of the arrangement between *Wilson* and *Clarke*; and when this case was called on for argument, and counsel were heard in a former Term, the Court ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendant on the second issue, and that the case should be submitted for argument upon the following question, namely, whether or not the plaintiffs were entitled to the judgment of the Court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.

*F. Pollock*, for the plaintiffs. It appears upon the plea that this is a cause of action which accrued to the bankrupt after bankruptcy, that the defendant had promised to pay the note to the bankrupt by name, or to his order; that the latter had indorsed it over to *Knight* and *Freeman*, and that they had indorsed it to the plaintiffs, and the question is, whether the assent of the assignees was necessary, in order to enable the bankrupt to pass the property in the note by indorsement, or rather whether it was not necessary that the assignees should claim the note, or dissent from the act of the bankrupt in order to render his indorsement ineffectual. Now, there are several cases which have decided, that unless the assignees interfere, a cause of action accruing to an uncertificated bankrupt after bankruptcy, is available to him, and if it be in the form of a negotiable instrument, it would be equally available in the hands of any person to whom he should indorse it. The present plaintiffs are to be taken as indorsees for good consideration, and it has been clearly established that the bankrupt himself would be entitled to sue, unless the defendant was protecting himself under the title of the assignees. The defendant does not do that. He does not allege that the assignees had claimed the note as belonging to the bankrupt's estate. All he says is, that from the circumstances which he has put on the record, the bank-

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rupt had no title whatever, and no right to indorse the note. The defendant however is estopped by his own act, from saying that, for after the bankruptcy he promises to pay the bankrupt himself, "*or his order*," which is a positive promise to pay either the bankrupt, or any person whom he shall appoint to be receiver of the money. It is too late therefore for the defendant to say that the bankrupt had no authority to indorse the note. He relied upon *Chippendale* v. *Tomlinson* (a), *Webb* v. *Ward* (b), *Fowler* v. *Down* (c), *Webb* v. *Fox* (d), *Coles* v. *Barrow* (e), and *Ashley* v. *Kell* (f).

*Chitty*, for the defendant. It is admitted that the party indorsing this note was an uncertificated bankrupt, and that the assignees did not consent to the indorsement. Unless therefore it can be shewn that the bankrupt had authority to pass the property in the note, the plaintiffs cannot recover. By law the property in this note absolutely vested in the assignees, not in their personal capacity, but as trustees for all the creditors. In that character they were bound to take to the note, and could not divest themselves of the interest which they had in it. The bankrupt was incapable of having any property in the note, and consequently could neither sue upon it himself, or convey a title to any other person by indorsement. It is quite clear from authorities, that supposing the note was drawn before the commission issued, but after a secret act of bankruptcy, the bankrupt could not have indorsed it. The question here is, whether, upon the doctrine of estoppel the defendant is precluded from disputing in any manner the validity of the indorsement in question. There is no doubt that a bankrupt may sue his assignees for work and labour, and that the future earnings arising from a bankrupt's labour, do not pass under the assignment, but according to the present existing law, whatever might be the inclination of parties to give effect to a

(a) 1 Cook's B. L. 446, 6th ed.
(b) 2 T. R. 296.
(c) 1 B. & P. 44.
(d) 7 T. R. 391.
(e) 4 Taunt. 754.
(f) 2 Stra. 1207.

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bargain of this nature, it cannot, in point of law, be operative. The doctrine laid down in *Nias* v. *Adamson* (a), seems decisive to shew, that even with the assent of the assignees, the bankrupt could not hold this property. That was a very strong case. There the assignees of an uncertificated bankrupt had by agreement, for valuable consideration, paid to them by a third person, left the bankrupt's furniture and effects in his possession, and afterwards, notwithstanding such agreement, seized the same, and it was held that they were justified in doing so, upon the principle that an uncertificated bankrupt cannot retain any property against his assignees. Putting the case therefore most strongly against this defendant, that the assignees had assented to the bankrupt's disposing of this note, the case cited is an authority to shew that they had no power so to part with their right over the note, as assignees. It follows then that it would make no difference in the case, even if all the assignees had assented to the indorsement of the note by the bankrupt, because they are bound to take to all property belonging to the bankrupt. This case is to be discussed upon legal principles, and according to law the bankrupt could acquire no property in this note, even with the assent of his assignees, and consequently could not indorse it so as to render it an available security in the hands of a third person. The case of *Kitchen* v. *Bartsch* (b), is an authority to shew that it is wholly immaterial whether the property came to the bankrupt before or after his bankruptcy, inasmuch as the assignment of the commissioners passes to the assignees all the bankrupt's after acquired, as well as present personal property. It was insisted in that, as in this case, that the defendant having contracted with the bankrupt, he was estopped from saying that the bankrupt had no title to the promissory note; but the Court over-ruled the objection. *Thomason* v. *Frere* (c), is a direct authority to shew that after an act of bankruptcy a bankrupt cannot pass the property in a bill by indorsement. The circumstance of the assignees interfering

(a) 3 B. & A. 225. (b) 7 East, 53. (c) 10 East, 418.

or not interfering has nothing to do with the question as to the power of parting with the property. In *Kitchen* v. *Bartsch*, the assignees had interfered, but *Nias* v. *Adamson* shews that that circumstance makes no difference. At all events it is found here as a fact that there was no assent on the part of the assignees, and *Thomason* v. *Frere*, is decisive to shew that the bankrupt could not pass the property in this note by indorsement, and consequently the defendant is entitled to judgment upon the whole record.

*Pollock*, in reply, was stopt by the Court.

ABBOTT, C. J.—Looking at this case as it is stated on the record, (which is the most favourable way of viewing it for the defendant) it appears to me that the plaintiff is entitled to the judgment of the Court. I say, that to view the case as it is stated on the record, is the most favourable to the defendant, because if we are to treat the case as turning upon the general issue only, it appears that this instrument has been indorsed over to the plaintiffs for valuable consideration, without authority, and with all the infirmities belonging to or connected with it. Looking at the case as it is upon the record, it is an action brought on a promissory note, made by the defendant, payable to *Clarke*, "or his order," and by *Clarke* indorsed to *Knight* and *Freeman*, and by them to the plaintiffs. The defendant has pleaded, first, the general issue, non assumpsit, and, second, that long before this note was paid to the plaintiffs, *Clarke* became bankrupt; that a commission of bankrupt issued against him, under which he was duly found and declared a bankrupt, by reason of which premises, and by force of the statute in such case made and provided, the interest, title, and right to indorse the said note in the declaration mentioned, before and at the time of the indorsement by *Clarke*, became vested in the persons who were named and chosen the assignees. There has been a replication to this plea,

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alleging that the note was indorsed by and with the consent of the assignees, upon which fact issue has been joined, and found against the plaintiff. It must therefore be taken as a fact that the indorsement was made by *Clarke* without the consent of his assignees, and we are to determine whether this plea so found for the defendant, be good in law as an answer to the action. Now the action being upon a promissory note, payable to *Clarke*, or to his order, we ought, according to the general rules and principles of law, which are framed with a view to the convenience of commerce, and the general interests of mankind, to give effect to this as a negociable security, unless there is some plain rule of law which ought to restrain its negotiability. Is there any such rule of law; or is the conclusion of law drawn in this case from the facts stated, a just conclusion? I am of opinion that it is not. The conclusion drawn is, that by reason of the premises, the right and title to indorse the note became vested in the assignees. If the right and title to indorse the note became vested in the assignees, the right and title to the property in it must have become vested in them absolutely. Now, if the property in a note of this description would become vested by law absolutely in the assignees, so would the property in any other chattel, acquired by an uncertificated bankrupt after bankruptcy; but the case of *Webb* v. *Fox* (a), has decided that the law is not so; for in that case it was determined that the property in a chattel acquired by an uncertificated bankrupt after his bankruptcy, does not vest absolutely in the assignees, for if it would, the plaintiff in that action, which was trover, could not have recovered. How then is it that it does vest in the assignees, and yet not absolutely? The way it vests in them, I take to be this, (and that which I think makes the distinction between this case and *Kitchen* v. *Bartsch*), it vests in them by law the right of interfering and claiming the property of the bank-

(a) 7 T. R. 391.

rupt, and if they do so, they may have it; but unless they interfere and claim, then the property, as between the bankrupt and his debtor, (or any third person claiming under him) has a right to it against all the world. It would be a great anomaly in the law if this defendant should be permitted to defend himself against the demand of the present plaintiffs, by setting up the title of the assignees, it not appearing that the assignees have in any way interested themselves in this matter, have ever claimed, or even will claim, the money from the defendant. We therefore think that he ought not to be allowed to retain the money in his own pocket, by setting up a plea to which the assignees are not at all privy. I am of opinion, under the circumstances stated in the plea, that *Clarke* had, as against the defendant, a right to indorse the note, and pay it away to a bonâ fide creditor. If hereafter the assignees shall claim the account of the note of the defendants, it is not for us now to say what the result of that claim will be. This I may say, that in the result such a claim shall be made, and found available against the defendant, he will have no fault to find with any body but himself, for it is from his own want of caution that he gave this instrument to *Clarke*, whereby he enabled a person in his situation to indorse it as an available security in the hands of third parties, instead of making it payable to the assignees.

BAYLEY, J.—I do not think that the issue found for the defendant on the special plea takes away from the plaintiffs the right to retain the verdict, and to have the fruits of their judgment upon the general issue. This is an action upon a note made by the defendant in the year 1818, payable to *Clarke, or the order of Clarke*. The defendant therefore, by the terms of his note, which is a negotiable security, intimates to all persons into whose hands the note may pass, that he guarantees *Clarke* as being a person capable of making an order upon the note, so as to convey the property in it. The defence now set up is, that at the time when he

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made the note, *Clarke* was not competent to make an order upon it. The necessary inference from that is, that the defendant issued a security to the world with a false representation on the face of it. Now, I take it to be a general rule with respect to negotiable securities, that a man is not at liberty to dispute the competency of a person to indorse such an instrument, when, by the very manner in which he makes himself a party to it, he asserts to the world that the person indorsing had competent power so to do. There was a case some years since, before my Lord *Ellenborough* at nisi prius (*a*), in which a bill was drawn upon the defendant by two infants, payable to their own order, and he having accepted it, the plaintiff became the indorsee of the two infants. The defence was, that as the infants had no power to indorse, their indorsements could not bind them, but Lord *Ellenborough* decided, and rightly, that inasmuch as the defendant had, by accepting the bill, admitted that they were competent to indorse, he could not be at liberty afterwards to say that they were not competent. So here, when the defendant, by the terms of his note, says "this shall be payable to *Clarke or his order*;" he affirms to the world in general, that *Clarke* is a competent person to make such order, and that he will pay the indorsee of *Clarke*. The substantive facts of this case are, that *Clarke* indorses the note to *Knight* and *Freeman* for a bonâ fide debt, and *Knight* and *Freeman* indorse for a valuable consideration to the present plaintiff, and neither *Knight* and *Freeman* or the plaintiff, knew the fact upon which reliance is now placed, in order to resist the plaintiff's claim. That fact is, that between three or four years before, *Clarke* had become a bankrupt, and consequently, that the right to indorse was vested in his assignees. I say "consequently," because that is the form of the argument relied upon by Mr. *Chitty*. But I think the right did not consequently vest in the assignees by reason of the bankruptcy, because I take it to have been settled by a great many de-

(*a*) *Taylor* v. *Croker*, 4 Esp. 187.

terminations, that an uncertificated bankrupt, though he cannot resist the claim of his assignees, if his assignees insist upon taking from him after-acquired property, yet he may acquire future property, and may maintain an action in respect of that property, provided the assignees do not interfere. I recollect that that question was very much discussed about thirty or forty years since, in the case of *Tomlinson* v. *Dighton*, in which an action was brought by Mr. *Tomlinson*, upon an attorney's bill, and the defence was, that before the bill was incurred, he had become a bankrupt, and was uncertificated. The question was, whether *Dighton*, who had employed him, was at liberty to rely upon his inability to sue. The Court, after great consideration, decided that it was no defence to *Dighton* to set up the rights of third persons; and they said that if the assignees chose to insist on their rights, they might do so, but as the assignees did not think fit to interfere, the plaintiff, though an uncertificated bankrupt, had a locus standi in curia, and might make a claim for his bill. The case of *Fowler* v. *Downe* followed up that principle. That was an action of trover, which is a species of action, specially founded in property, and therefore the decision of that case proceeded upon this ground, that if the assignees did not interfere, an uncertificated bankrupt might, as against a wrong-doer, be considered as having a property in those things which he had acquired after his bankruptcy. The case of *Ashley* v. *Kell* (a), proceeds on the same ground, that an uncertificated bankrupt has a right to transact any sale with respect to after-acquired property, unless the assignees think fit to interfere. They have a right to seize and take the goods, but if they are passive, he has all the rights of property vested in him. In this case it appears to me, that inasmuch as the defendant has by the form of his promissory note, stated that he will pay *to the order* of *Clarke*, he cannot protect himself from paying to any order that *Clarke* has made, on the ground of incapacity to make

(a) Stra. 1207.

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such order, first, because it would be contrary to his own assertion, which imports that *Clarke* was competent; and second, because *Clarke* was, in point of fact, at the time he indorsed the note, a perfectly competent person. The case of *Thomasin* v. *Frere* is distinguishable from this, because in that case the right to indorse the bill existed only up to the time of the bankruptcy, and the bankruptcy having taken place before indorsement, the right to indorse was transferred to the assignees; whereas the foundation of this defence is, that there never was any right whatever in the bankrupt to indorse. But for the reasons I have stated, I am of opinion, that as against this defendant, and as against all the world, except the assignees, the bankrupt *Clarke* was a person competent to make the indorsement, and consequently the plaintiffs are entitled to judgment on the whole record.

Holroyd, J.—I am also of opinion, that the plaintiffs are entitled to judgment upon the whole record, notwithstanding the verdict found for the defendant on the special plea. Where a bill of exchange or promissory note, which is transferrable by general indorsement, falls into the hands of one not authorised to negotiate it, an indorsee who derives title from him, may transfer it to an innocent indorsee as an available security, notwithstanding it was originally taken from a person who had no right to indorse. This would be so where a note was lost or stolen. Now in this case, the defendant, by the form of his note, undertakes to pay the money to *Clarke or his order*. He therefore gives *Clarke* authority to indorse the note, and though *Clarke*'s assignees would have a right by the assignment to interfere and say, "Don't pay the money to *Clarke*'s order, because we are entitled to it as assignees," yet the defendant would be concluded from saying that *Clarke* had no authority to make the order as against persons who had received the indorsement, and who were not cognizant of the right of any other person to interpose. It is not true that the assignment

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vests in the assignees absolutely all future property acquired by an uncertificated bankrupt. Suppose the assignees did not chuse to seize this note, or suppose they refused to have any thing to do with it, is the bankrupt to loose the proceeds of the note, and be deprived of the benefit of such property, because his assignees neglect their duty? It is perfectly clear, that the assignment only gives the assignees the right to interfere with the bankrupt's after-acquired property, but it does not absolutely vest it in them. The case cited from *Strange* is an authority to shew that property, even the subject of trade and sale, acquired by the bankrupt after bankruptcy, does not vest absolutely in the assignees. If that be so of goods, à fortiori it is so in the case of bills of exchange and promissory notes, because with respect to them, the indorsees are not bound to know of any private rights vested in other persons, of which they themselves are not cognizant. I do not think that this was property which absolutely vested in the bankrupt's assignees, and as the defendant is by the form of the note estopped from saying that *Clarke* had no authority to indorse, I am of opinion that the plaintiffs are entitled to recover both upon the general issue, and upon the whole record.

Judgment for the plaintiffs (*a*).

(*a*) *Best*, J. was absent.

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JONES and Another *v.* SIMPSON, PINHORN, GREEN, NELSON, WILSON, FULFORD, and BRADLEY.

*Friday, Nov. 14.*

Consignor of goods sends to consignee the following order:— "Please to [illegible] to N. on [illegible]

THE following case was sent by his Honor the Vice-[illegible]llor for the opinion of this Court:—

[illegible] *Blackburn* carried on the business [illegible] the de-[illegible]

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fendant *Simpson* carried on the business of a merchant, in partnership with the defendant *Wilson*, of *Quebec*, in *Canada*, such business being carried on in *London* in the name of *Simpson* alone, and at *Quebec* under the firm of *C. Wilson* and *Co.* In the year 1811, *Blackburn* delivered to *Simpson* twelve bales of woollen cloth, invoiced at 1640*l.* 17*s.* 10*d.* to be shipped and consigned to the firm of *Wilson* and *Co.* at *Quebec*, to be sold there on the account and at the risk of *Blackburn.* They were duly shipped by *Simpson*, and consigned to and received by the firm of *Wilson* and *Co.* at *Quebec*, by whom the same were sold, and the proceeds, or some parts thereof, were afterwards remitted to *Simpson.* On the 7th *August*, *Blackburn* wrote and sent to *Simpson* the following order:—"Mr. *R. Simpson*, please to pay to *Nelson*, on account of the assignees of *Oakley*, *Overend* and *Oakley*, the proceeds of a shipment of twelve bales of goods, value about 2000*l.* consigned by me to you." On the 21st of the same month, *Simpson* wrote and sent to the defendant *Nelson*, as one of the assignees of *Oakley*, *Overend*, and *Oakley*, the following undertaking:—"Shipped on board the *Sarah*, from *London* to *Quebec*, for the account of *W. Blackburn*, twelve bales of woollen cloth, value, as per invoice, 1640*l.* 17*s.* 10*d.* there to be sold, and the proceeds to be paid to his order, dated the 7th instant, to the assignees of *Oakley*, *Overend*, and *Oakley*. In pursuance of the said order of *Blackburn*, I do hereby consent and engage to pay over the full amount of the net proceeds of the said twelve bales of woollen cloths, as I may from time to time receive the same, unto the said assignees, without delay." On the 15th *July*, 1812, a commission of bankrupt issued against the said *W. Blackburn*, under which the plaintiffs, *Jones* and *Hirst*, were chosen assignees. Pursuant to an order made in this cause, bearing date the 23d *July*, 1818, *Simpson* paid into the Bank of *England*, in the name of the Accountant-General, in trust in this cause, the sum of 409*l.* 5*s.* 7*d.* in respect of the proceeds of the said bales of

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woollen cloths. *Simpson* has since become bankrupt, and the defendants, *W. Fulford* and *T. Bradley* are the assignees under the commission against him. The question for the opinion of the Court is, whether the above two instruments, or either, and which of them, require such a stamp as the stamp acts impose upon bills, drafts, or orders for payment of money.

*Littledale*, for the plaintiffs. This question must depend upon the construction of the 48 *Geo.* 3. c. 149, because that was the stamp act in operation at the period when the instruments were made. In the schedule of that act, Part 1. title *Bill of Exchange*, various duties are first imposed upon bills, in proportion to the amount for which they are payable; and it afterwards imposes upon "any bill, draft, or order for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, when the total amount of the money thereby made payable, shall be specified therein, or can be ascertained therefrom, the same duty as on a bill payable to bearer, or order, for a sum equal to such total amount." [*Abbott*, C. J. But "where the total amount of the money thereby made payable, shall be indefinite," the act imposes "the same duty as on a bill for the sum expressed only." Now here, no sum whatever is expressed, and therefore how is the stamp to be ascertained? The first clause clearly cannot apply to this instrument, because it specifies no sum, nor can any sum be ascertained from it; then how can the act bear at all upon this case?] At all events the subsequent clause of the schedule is applicable, which provides that various instruments there enumerated, "shall be deemed and taken to be inland bills, drafts, or orders for the payment of money," among which is any "order for the payment of any sum of money out of any particular fund, which may or may not be available." The order here is for the payment

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"of the proceeds of a shipment of twelve bales of goods, value about 2000*l.* consigned by me to you." That is clearly an order, in the language of the schedule, for the payment of money out of a particular fund, which may or may not be available, and is therefore expressly within the decision of this Court in *Firbank* v. *Bell* (*a*), where Lord *Ellenborough*, commenting on an exactly similar clause in the 55 *Geo.* 3. c. 184, Schedule, Part 1, says, "It was the object of the legislature in framing this provision, to treat as promissory notes and bills of exchange, and to subject to a stamp duty, such instruments as being payable on a contingency, or out of a particular fund, could not in strictness, fall under that denomination." [*Bayley*, J. That was meant, in both statutes, to apply to instruments which are in form similar to bills of exchange, but which, being payable out of a particular fund, were by the law distinguished from them. But this instrument does not in any respect partake of the nature of a bill of exchange, and therefore cannot fall within my Lord *Ellenborough*'s description. *Abbott*, C. J. Besides, in *Firbank* v. *Bell*, the order was for the payment of a specific sum of 1500*l.*; here no sum is mentioned; the order is to pay "the proceeds."] In *Butts* v. *Swan* (*b*), there was a decision similar to that in *Firbank* v. *Bell*, but undoubtedly they are both open to the objection last raised by the Court, because in each of those cases the amount of the sum was expressed upon the face of the instrument. At any rate, though the sum is not named, the instrument is an order for the payment of money, and as the precise amount might afterwards be ascertained when the goods were sold, it would seem that the term used, "the proceeds," is a sufficiently certain expression. [*Best*, J. If a stamp was requisite, it was requisite also to affix it at the time when the instrument was drawn; but that it was impossible to do; because, as the sum to be made payable by it was quite uncertain and unknown, the party could not, in the nature of things,

(*a*) 1 B. & A. 36. (*b*) 2 B. & B. 76.

ascertain what stamp would be proper. The omission of the specific sum meant to be made payable, is decisive to take this instrument out of the operation of the statute.]

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*Marryat*, who was to have argued for the defendants, was stopped, and the Court declared the case to be too plain for argument, and the following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us, and we are of "opinion, that neither of the two instruments required such "a stamp as the stamp acts impose on bills, drafts, or orders "for the payment of money.

"C. ABBOTT,
"J. BAYLEY,
"G. S. HOLROYD,
"W. D. BEST."

NIGHTINGALE *v.* MARSHALL and Another.

*Friday, Nov. 14.*

By the Vestry Act, 58 *Geo.* 3. c. 69. s. 3. persons rated to the poor in respect of any annual rent, profit, or value, not amounting to 50*l*., shall be entitled to one vote and no more at vestry meetings, and to an additional vote in respect of every additional 25*l*. to which they shall be rated, not exceeding six votes in the whole. Where, however, in the parish of *St. M.* the poor rates had, according to ancient custom, been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the person assessed:—Held, that persons so rated were not within the benefit of the 3d sec. of the Vestry Act as to the plurality of votes, although assessed in respect of property exceeding 50*l*. in amount.

THIS was an action on the case for a false return to a writ of mandamus. The declaration alleged, that on the 22d of *November*, 1821, the office of sexton of the parish of *St. Mary, Whitechapel*, having become vacant, the plaintiff was nominated and elected thereto by a majority of the persons entitled to vote; that it thereupon became the duty of the defendants, as churchwardens of the parish, to admit the plaintiff to the office, but they refused so to do; and in their return to a writ of mandamus issued on the 11th of *February*, 1822, commanding them so to admit the plaintiff,

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they falsely returned that the plaintiff was not duly nominated and elected to the office. The cause was tried before *Abbott*, C. J., at the *Middlesex* Sittings, after last *Trinity* Term, when a verdict was found for the plaintiff, with nominal damages, subject to the opinion of the Court upon the following case:—

The office of sexton for the parish of *St. Mary, Whitechapel*, in the county of *Middlesex*, is an ancient office, and the right of election is in the inhabitants of the said parish, paying church and poors' rates, in vestry assembled. In *November*, 1821, the office became vacant, and on the 22d of that month a public meeting was duly holden for the election of a sexton. There were two candidates, the plaintiff and one *J. W.* While the election was proceeding, several inhabitants of the parish, entitled to vote, claimed a right to give more than one vote, under the 58 *Geo.* 3. c. 69. s. 3, by which it is enacted, "That in all such vestries every inhabitant present, who shall by the last rate, which shall have been made for the relief of the poor, have been assessed and charged upon, or in respect of, any annual rent, profit, or value, not amounting to 50*l.* shall have and be entitled to give one vote, and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon, or in respect of, any annual rent or rents, profit, or values, amounting to 50*l.* or upwards, whether in one, or in more than one, sum or charge, shall have and be entitled to give one vote for every 25*l.* of annual rent, profit, and value, upon or in respect of which he shall have been assessed or charged, in such last rate; so, nevertheless, that no inhabitant shall be entitled to give more than six votes." At the close of the election the numbers were, for *J. W.* 639, and for the plaintiff 631; but if a plurality of votes was admissible in the parish of *Whitechapel*, with respect to the election of a sexton, pursuant to the 58 *Geo.* 3. c. 69. s. 3, such a number of votes was tendered as was sufficient to give the plaintiff a majority of votes. The defendants were churchwardens of the parish at the time of the

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election, and they admitted *J. W.* to the office; and in return to a mandamus, commanding them to admit the plaintiff, they returned that the plaintiff was not duly nominated and elected; and the only question in the case is, whether, under the circumstances hereinafter stated, a plurality of votes was admissible at the said election, pursuant to the statute 58 *Geo.* 3. c. 69. s. 3, so as to entitle the inhabitants paying rates as aforesaid, at the election of a sexton, to give more than one vote. In point of fact, the poor rates are not assessed, and never have been assessed, upon all the inhabitants uniformly, according to an equal pound rate; but the rate purports to be made, and according to an ancient custom in the parish always has been made, by the discretion of the vestry, without respect to value, but according to the ability of the party charged, such ability being estimated with reference to property, whether in the parish, or out of it. In some instances the property is stated in respect of which the party is charged; but in a great majority of cases the property is not stated, and where it is stated, the rate is not in proportion to the rent of the property; for example,

| Rent. | | Poor's Rate. | | Church-rate according to an equal pound-rate. |
|---|---|---|---|---|
| £ | | £ | s. | |
| 40 | *L. Turner*, for two cooperages, | 5 | 11 | |
| 40 | *Alexander Mann*, for house, . . | 10 | 15 | |
| 50 | Mr. *Lucas*, for house, . . . . . | 9 | 10 | |

*F. Pollock*, for the plaintiff. If the inhabitants of this parish have been rated, either "upon," or "in respect of," an annual rent of 75*l*. they are entitled to two votes, although they may not have been rated uniformly, nor according to an equal pound-rate. [*Abbott*, C. J. The object of the statute is evidently to apportion the number of votes to the amount of the burthen sustained by the parishioner; and that has not been done here, for the rate is made without any apportionment, and independently of all rule.] The parishioners have been rated, so far as respects the poor

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rate, according to their ability, but still the rating has been "in respect of" *some* annual rent; and the amount of that rent has been ascertained with reference to the church-rate, which has always been an equal pound-rate. The principle of the statute, therefore, applies to the poor-rate, because, although it was not made in proportion to the annual rent, it was made in respect of it, for until *some* annual rent had been ascertained, no individual could be rated at all. The spirit of the statute has been fully complied with, for the legislature clearly seem to have intended that property should be the criterion of the right of voting, and that the number of votes should be regulated, not by the amount of the burthen actually borne, but by the ability of the party to bear it. [*Abbott*, C.J. How is it possible to say that these parties have been rated "for or in respect of" their annual rents, in the language of this act of parliament? The instances given in the case prove the exact reverse.] It is not necessary to contend for the validity of the rate as such; it may be bad as a rate, and yet may be so far made in pursuance of the statute as to confer a plurality of votes. A reference to the local act of parliament, by which the power of making this rate is given, will shew that the general object of the parish is to assess the inhabitants according to their ability; for in the 46 *Geo.* 3. c. 89. s. 53 (*a*), the rate is directed to be made upon all persons holding or occupying any premises within the parish, in respect of their tenements, generally, without reference to the amount of their rents. Coupling that section with the third section of the public act, it will appear very clearly that this is a rate made "in respect of" an annual rent. It cannot be contended that it is made "upon" the rent, because that word evidently implies a pound-rate; but the words "in respect of," are used disjunctively, and in contradistinction to the word "upon;" the one means an equal pound-rate, the other means *any* rate made in respect of the occupancy of the party in the parish. Now, this is a rate, not indeed a regular, proportionate, or uniform rate, but still a rate in

(*a*) Not printed among the public acts.

respect of occupancy, and therefore, in respect of some annual rent, profit, or value, and consequently sufficient to confer the privilege of voting as claimed by these parties.

*Parke*, for the defendants, was stopt by the Court.

ABBOTT, C. J.—I give no opinion on the present occasion as to the validity or invalidity of the rates of this parish, nor any opinion as to the effect of the 8th section of the 58 *Geo.* 3. c. 69. My opinion is founded exclusively on the third section, providing for a plurality of votes. That section enacts, "that every inhabitant who shall by the last rate that shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value, not amounting to 50*l.*, shall have and be entitled to give one vote, and no more; and upon or in respect of any annual rent, &c. exceeding 50*l.*, one vote for every 25*l.* of annual rent, &c. upon or in respect of which he shall have been assessed." Now, looking at the rate in question, I am clearly of opinion that no person in the parish of *St. Mary, Whitechapel*, is rated "upon or in respect of any annual rent, profit, or value." A rate so made must be proportioned to the amount of the rent, profit, or value, in respect of which it is made; but this is not so proportioned; but is evidently made, not upon the criterion suggested in the act, namely, the annual value of the property of the individual, but according to his ability to contribute towards the relief of the poor. For these reasons I think the section of the 58 *Geo.* 3, conferring a plurality of votes cannot apply to this parish, rated as it at present is, and consequently that the plaintiff was not properly elected to the office which he claims. A nonsuit therefore must be entered.

BAYLEY, J.—I am of opinion, that, according to the form of the rate, this parish does not come within the provisions of the 58 *Geo.* 3. c. 69. s. 3. The general rule of

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rating throughout the kingdom is, that there shall be a rate upon each individual according to the value of the property which he has in the parish, and he is in general charged and assessed upon that value. For instance, when the value of the property which twenty individuals have, is ascertained, each contributes precisely and exactly the same sum, the value being the criterion of contribution. I think that the object of the legislature in passing the act in question was, that each man should have his right to vote at vestry meetings increased to the extent to which his contribution towards the parish burthens was increased. If that was the principle on which the provision in the 3d section of this act was framed, it does not apply to the case in question, because it appears on the face of this rate that the mode of proceeding in this parish according to custom (which may be a legal mode, and which to a certain extent appears to be recognized by the private act 46 *Geo.* 3.) prevented the value of property being the criterion of the amount of rate which each individual is to pay. The custom followed by this parish does not at all furnish the criterion by which the inhabitants are to be assessed. In some instances, if a man is assessed at the annual value of 50*l.*, he would be entitled to two votes, though he contributes less than a man whose property is valued at 40*l.*, who is only entitled to one vote. It appears to me, therefore, that within the meaning of this act of parliament, the inhabitants of this parish cannot, with reference to their poor rate, be said to have been assessed or charged in respect of the annual rent, profit, or value of their property; and consequently the provision as to the plurality of votes is inapplicable.

HOLROYD, J.—I think the rate in question is not such a rate as to bring this parish within the 3d sec. of this act of parliament with respect to the plurality of votes. In order to bring it within that section, it is necessary that the parties should be assessed and charged upon, or in respect of, some annual rent, profit, or value. The rate does not

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shew that they have been so charged. Certain rents are stated in the case, but the inequality of the rates shew that they were not charged upon or in respect of those rents. It does not appear that the rates are charged in respect of any profit or value, much less does it appear to what amount the inhabitants have been assessed. I therefore think that by the rate which was given in evidence, it is not sufficiently shewn that this parish comes within the benefit of this provision.

Best, J.—I am of the same opinion. If the inhabitants of this parish wish to bring themselves within the provisions of this statute, they must alter their mode of rating. The act does not merely require that the parties should be rated at the sum of *50l.* or upwards, in order to their having a second vote; it requires that they should be rated upon their annual rents, profit, or value. The case states that by an ancient custom in the parish, the rates are always assessed "by the discretion of the vestry, and *without respect to value*;" and an inspection of the rate itself at once shews that its amount is in no degree proportioned to the amount of property in the parish. It is therefore impossible to contend that the mode of rating prescribed in the act has been adopted in this parish; and, without that, there can be no claim to the plurality of votes conferred by the act.

Postea to the defendant.

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*Friday*, Nov. 14.

## The Earl of LONSDALE *v.* NELSON and others.

To trespass for breaking and entering the plaintiff's close, called the manor, defendants pleaded, first not guilty, and second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public and common navigable river from time immemorial, and that there is in that part of the port which is within the manor, a certain ancient work or erection belonging to the said port, necessary for the preservation of the same, and for the safety and convenience of the ships resorting thereto; that this work being damaged and in decay at the said times when, &c. it became necessary that the said work should be repaired, but that plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore defendants entered and repaired. Replication, de injuriâ suâ. A verdict having been found for the plaintiff on the general issue, and for the defendants on the special plea:—Held, that the plaintiff was entitled to judgment, notwithstanding the finding on that plea, inasmuch as it did not state that *immediate* repairs were necessary, or that any one bound to do so, had neglected to repair *after notice*, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port.

THIS was an action of trespass for breaking and entering the manor of plaintiff, called *Seaton*, pulling down a quantity of wooden paling and fencing of plaintiff, erecting a quantity of wooden paling and fencing, and depositing a quantity of timber, stones, bricks, and rubbish. Second count was in substance the same, only describing the locus in quo as the close of plaintiff. Pleas, first, Not Guilty. Second, that the close in the second count mentioned, and in which, &c. before and at the said several times when, &c. was, and from thence hitherto continually hath been, and still is, within, and part and parcel of the said manor in the first count mentioned; and that before and at the said times, when, &c. there was, and from thence hitherto continually hath been, and still is, a certain ancient and public port, haven, or harbour called *Workington* harbour, partly within the said manor and close; and also in a certain river, to wit, the river *Derwent*, in a certain part thereof, where the said river now is, and at the said times when, &c. was, and from time whereof the memory of man is not to the contrary, hath been a public and common navigable river, in which the tides and waters of the sea, for and during all that time, have flowed and reflowed, to wit, at, &c.; and defendants further say, that before and at the said times when, &c. there was, and hath been within that part of the said port, haven, or harbour, which is within the said manor and close, a certain ancient work or erection, of and belonging to the said port, haven, or harbour, and which was and is requisite and necessary for the support, maintenance, and preservation of the said port,

haven, or harbour, for the rendering of the same, and the navigation thereof, safe and commodious for the ships and vessels resorting thereto, to wit, at, &c.; and defendants further say, that before any of the said times when, &c. the said work or erection had been greatly damaged and injured, and was in great decay, and in a bad, ruinous, and dilapidated state and condition for want of needful and necessary repairing and amending thereof; and that it so remained and continued until and at the said times, when, &c.; and that before and at the said times, when, &c. in the first and second counts mentioned, it was requisite and necessary for the support, maintenance, and preservation of the said port, haven, or harbour, and for the keeping and preserving of the same, and the navigation thereof in a safe and commodious state and condition for the ships and vessels resorting thereto, that the said work or erection should be repaired and amended; but that plaintiff did not, nor would, repair or amend the same, or any part thereof, but wholly neglected so to do. Wherefore defendants, whilst the said work or erection was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid, for the purpose of repairing and amending the said work or erection, at the said times, when, &c. in the first and second counts mentioned, broke and entered the said manor and close in which, &c. and repaired and amended the said work or erection, where the same was so in decay, &c.; and because the paling and fencing in the first and second counts first mentioned, were part of the said erection, and in great decay, defendants pulled them down, and repaired the erection with the paling, fencing, stones, &c. in the same counts secondly mentioned. There was a fourth plea, stating that a part of a public navigable river was situate within the said manor and close, and that the said work or erection was requisite and necessary for rendering safe and commodious the navigation of the said river. Replication, de injuriâ suâ, and issue thereon. At the trial before *Wood*, B. at the *Summer* Assizes for the county of *Cumberland*, in 1822, the plaintiff had a verdict on the issue on the first plea, the

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defendant had a verdict on the issues on the second and fourth pleas, and upon the other issues the Jury were discharged from returning any verdict.

*Scarlett*, in *Michaelmas* Term, 1822, obtained a rule to shew cause why the judgment should not be entered for the plaintiff on the second and fourth pleas, non obstante veredicto; and the Court then directed that the rule should be argued in the shape of a special case; in which shape it now came on for argument accordingly.

*Parke* for the plaintiff. These pleas cannot be supported; and the same objections apply to both, there being no material distinction between one and the other. The erection in question is a private work, situate in a public port or river, and the only question is, whether any individual is by law entitled to enter upon it for the purpose of repairing it, without giving notice to the party bound to repair, with a reasonable interval of time for the performance of the repair by him, and without alleging that the party entering has occasion to use the port or river, and that the owner of the work is liable to repair. In all these particulars these pleas are deficient, and those deficiencies are clearly fatal. According to Lord *Hale* (a), the plaintiff might be liable to repair the work, if it appeared that he had dedicated it to the use of the public; but that does not appear, and therefore as he is not liable on that ground, no other individual is. Assuming, however, the plaintiff's liability to repair, still no precedent or authority can be found for a right in any one of the king's subjects, under such circumstances, to enter and do the repairs according to his own whim or judgment. The only ground upon which such a right can be contended for is, that the work had, in consequence of its ruinous and decayed condition, become a public nuisance, which the defendants, or any other persons, were at liberty to abate or reform. There is, however, with

(a) De port. Mar. 78.

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reference to such a right, an important distinction established between nuisances of commission and nuisances of omission. There are several cases to be found in *Viner's Abridgment* (*a*), and in *Roll's Abridgment* (*b*), of the abatement or reformation of nuisances by the public, or by the parties aggrieved, but they are, without exception, nuisances of commission. This seems, indeed, to be a very reasonable distinction, and its propriety becomes the more apparent by considering the analogy between this mode of proceeding and the remedy by writ of assize, which, it seems, lies for commission only, and not for neglect; for it is said in *Roll's Abridgment*, "If a man who ought to scour a ditch, does not do it, by means whereof my field is drowned, no assize lies" (*c*). The objects of the writ of assize are remedial to remove the nuisance itself, and to make remuneration to the person aggrieved by it; but the repairing under circumstances like the present would probably be productive of great inconvenience, and would throw a double burthen upon the plaintiff, for he might first be obliged to undergo the repairs made by the defendants, and afterwards to perform more suitable repairs himself. Under a writ of assize, the party injured may enter and abate the nuisance; *Penruddock's* case (*d*), 17 *Ed.* 3. 44. 9 *Ed.* 4. 35; but if he does enter and abate the nuisance, the writ abates. *Baten's* case (*e*), *Fitzherbert*, 183, note *a*. Now, although it appears that where the party may have a writ of assize, he may also enter to abate the nuisance; yet it does not appear that he may enter, where he may not have the writ; and therefore as it has already been shewn that he cannot have the writ for a nuisance of omission, it follows that he cannot enter to abate a nuisance of omission, but must resort to the remedy which the common law provides, a bill of indictment. If this reasoning be conclusive, the result

(*a*) Vin. Abr. Nuisance (S.)

(*b*) 2 Rol. Abr. 144, Nuisance, (S.)

(*c*) 2 Rol. Ab. 141, Nuisance. Assize, (H.) pl. 9. citing 11 H. 4. c. 83.

(*d*) 5 Co. Rep. 101.

(*e*) 9 Co. Rep. 55.

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is, that these pleas are bad in toto, and at any rate they are clearly bad for omitting to aver that the plaintiff was bound to repair; that he received notice to repair, and that a reasonable time for the performance of the repair had elapsed. The latter is an indispensible allegation, because a building such as the work in question, might fall into a state of dilapidation by sudden accidents, such as a violent storm, and then the defendants might claim a right to enter the very next day and repair it, before it was possible for the plaintiff to interfere.

*E. Alderson*, for the defendants. The distinction between nuisances of commission and those of omission, has been extended in argument far beyond its real bearing and importance. The actual pulling down of a pier would undoubtedly rank under the former head; but so in effect would the suffering it to fall for want of repair, for each is a public nuisance, and the public receive an equal injury from the neglect to repair, as they would from the wrongful removal. This case may be considered in two points of view; one upon the principle that some person is liable to repair the pier, and the other that no person is liable. Now there certainly is no authority for saying that by the common law any individual is bound to repair an erection of this nature, though certainly he may be bound by prescription. There is one dictum upon the point, and one only to be found, which is in *Brooke's Abridgment* (a), and that is very much shaken by an observation thrown out at the end of the case by *Green*, J. who says, "it appears that the opinion is not law." The present case is very distinguishable from that of a highway, for there the parish are liable at common law to repair, and can only relieve themselves from their liability by shewing that it has devolved upon some other person; but here it would be impossible to shew a liability to repair in any person. Then, if no individual is liable to repair the pier, the right of re-

(a) Bro. Abr. Presentment in Court, pl. 9.

pair devolves ex necessitate rei upon the public, and any person may enter for that purpose. [*Abbott*, C. J. The pier is not stated to have existed time immemorial.] No; and therefore the question of liability by prescription does not arise, and thus if no individual is bound to repair, and the king's subjects are not privileged to repair, the pier must become lost by decay, and the public consequently injured. It has not been decided, that the common law remedy of indictment might be enforced against any person who should pull down the pier, and yet it is contended, that it may be suffered to fall with impunity. This would be productive both of injustice and absurdity, and is opposed to various dicta upon the subject, several of which, if construed liberally, as they ought to be, are sufficiently extensive to include the present case. The first of these authorities is Lord *Hale*, who says (*a*), "Nuisances of ports are of two kinds; first, such as are immediately only nuisances to the private concernment of the lord of the franchise; secondly, such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some; first, silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choaked; secondly, decays of the wharfs, quays, and piers, which are for the lading of merchandize and safeguard of shipping." Here is a nuisance of omission expressly named; and Lord *Hale*, in summing up the subject generally, and without making any distinction between nuisances of commission and nuisances of omission, adds, "any man may justify the removal of a common nuisance, either at land or by water, because every man is concerned in it." Every imaginable case of public nuisance, by neglect, is comprehended by these terms, and therefore if a house were likely to fall, or a sea-bank were in danger of giving way, through want of repair, any person might apply the festinum remedium. [*Bayley*, J. In those cases the remedy would be a removal only; but here

(*a*) De port. Mar. p. 2. c. 7.

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the defendants have added new work to the pier, and that may or may not have been done in a manner injurious to the public, or the owner.] The propriety, or sufficiency of the repairs that were done, was a question for the Jury, and the pleas state, that the entry was made "for the purpose of repairing and amending the work," and that the defendants "repaired and amended the said work when the same was in decay." [*Abbott*, C. J. The pleas do not state, that such repairs only as were necessary, and no more, were done.] That was matter for new assignment by the plaintiff; the pleas were sufficiently explicit in the first instance. But there are other cases which shew that the defendants were justified in the course they adopted. If a house be on fire, it may be pulled down by the public, in order to prevent the fire from spreading; *Mouse*'s case (*a*), which is a much stronger case than the present, for there an actual injury is done to the individual, for the benefit of the public. So with respect to highways, it is said, a man is not bound to lop his trees which overhang the road, and therefore another may do it. *Brook's Abridgment* (*b*). If, therefore, no person was liable to repair the pier, the defendants were justified in doing it; and if the plaintiff was liable, then his omission becomes a nuisance by commission, and he is a tort-feazor, and cannot maintain an action to support his own wrong. [*Abbott*, C. J. There is no averment in the pleas that it was necessary that the repairs should be done instanter, at that time when the defendants entered to do them; nor that notice of the pressing necessity of repair was given to the plaintiff; nor that the defendants themselves, or any other individual, had been prejudiced by the state of the pier.] There is a general averment that the repairs were necessary, and that after verdict is enough; the object was to prevent danger and inconvenience, and that was a sufficient ground for interfering.

(*a*) 12 Co. Rep. 63.

(*b*) Bro. Abr. Nuisance, 28. See also 8 H. 7. 5 a. Kitchen, 34. Dalton, c. 26. 1 Hawk. P. C. c. 76. s. 52.

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The same principle was laid down very strongly in *Rex* v. *Wilcox* (*a*), " where the defendant, who was indicted for keeping a house which was a nuisance, was convicted and fined, it was moved, that by the act of general pardon, the defendant was excused and discharged, both as to the fine and the abatement of the nuisance; but the Court, upon consideration, held, that he should be discharged only as to the fine, and not as to the abatement, for that is not a punishment of the party, but a removal of that which is a grievance to other people, and any person may abate a common nuisance." The public, therefore, in a case of nuisance, have a twofold right, first to punish the offender, and secondly to redress themselves. Again, in *Glever* v. *Hynde* (*b*), the Court of C. P. said, " at common law, any person there present might have removed the plaintiff; for they were all concerned in the service of God, that was then performing; so that the plaintiff, in disturbing it, was a nuisance to them all, and might be removed by the same rule of law that allows a man to abate a nuisance." With respect to the objection, that the pleas do not expressly state that no more was done to the pier than was absolutely necessary, it appears by decided cases, that where the nuisance is public, such an allegation is not necessary. *Lodie* v. *Arnold* (*c*) and *James* v. *Hayward* (*d*).

*Parke*, in reply. The cases that have been cited on the part of the defendants, are perfectly inapplicable to the present. They merely go to support a position which it is not necessary for the plaintiff to dispute, namely, that any man is justified in abating a nuisance which is dangerous to the public at large. That position does not arise upon these pleadings, because there is no suggestion upon the record of any pressing necessity for the interference of any person, nor of any impending danger or nuisance to the king's subjects. The case, therefore, rests entirely upon the question

(*a*) 2 Salk. 458.
(*b*) 1 Mod. 168.
(*c*) 2 Salk. 458.
(*d*) Cro. Car. 184.

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of a general right to enter and repair, without previous notice to the owner, without the intervention of a reasonable time for him to repair, and without proof that the party claiming to repair had occasion to use the pier, or was dammified by its being in a state of decay. It is quite clear, that no such right exists where the owner is bound to repair; but, it is contended, that it necessarily accrues where the owner is not bound to repair; and it is asserted, that the plaintiff is in that situation. The defendant's pleas, however, are decidedly opposed to that argument, because they allege that the plaintiff "did not nor would repair, but wholly neglected so to do." No case can be found, nor indeed imagined, in which the liability to repair would not be thrown upon some party or other, either by the common law, by statute, or by prescription; but even granting the present to be that case, still there is no authority for saying that any one who chuses may intrude for the purpose of repairing in the manner that these defendants have done. If there had been a dedication of the pier to the public for so long as it might last, an indictment might lie against any person who should remove it, but could not be supported against the owner for neglecting to repair it, nor would the public have any right to repair it themselves. *Viner's Abridgment* (a), *Roll's Abridgment* (b). The quotation from Lord *Hale* does not support the position, that any individual may abate a nuisance of omission; and the case which he cites on the occasion is one of a nuisance of commission. He says, "The burgesses of *Southampton* justified the throwing down of a wear belonging to the abbot of *Tickford*, in a creek of the sea, quia *levata fuit* ad nocumentum Domini Regis et villæ *Southampton*, et quod batelli et naves impediantur quominus venire possunt ad portum villæ;" and even in such a case as that, where an actual injury to the public is alleged, arising from a nuisance of commission, he goes on to say, "but because this many times occasions tumults and disorders, the best way to reform public nuis-

(a) 16 Vin. Abr. 20. (b) 2 Rol. Abr. 137.

ances is by the ordinary courts of justice." Upon the whole, therefore, it is clear that these pleas cannot be supported, and that the plaintiff is entitled to have judgment entered up non obstante veredicto.

ABBOTT, C. J.—I am of opinion that the plaintiff is entitled to judgment, notwithstanding the verdict found for the defendant on the two special pleas, which have been the subject of discussion. The action is in trespass. The first count is for breaking and entering the *manor* of the plaintiff, and the second for breaking and entering the *close* of the plaintiff; the only difference between the one and the other being, the substitution of the word "close" in the second count, for the word "manor" in the first. The plaintiff had a verdict upon the general issue, which of course established his right both to the manor and close, and the possession of both is ascertained by the verdict on that issue, and the only question is, whether the special pleas shew a sufficient justification on the part of the defendants in entering the close and pulling down that which they found erected upon it, and erecting something else in its place. It is incumbent on him who enters on the soil of another, to give satisfactory proof of his right so to do, and in the absence of such proof, he must be taken to have acted illegally. Now supposing all the allegations in these pleas to have been substantiated by evidence, what do they amount to? They state, that there now is, and from time immemorial has been an ancient harbour, and navigable river, partly situate within the close and the manor; that in that part of the harbour which is within the close and manor, there is an ancient erection necessary for the maintenance of the harbour, and for rendering the same, and the navigation thereof and of the river, safe and commodious for the vessels resorting thereto; but not stating that the erection has been from time immemorial; that the erection was in a state of dilapidation and decay; and that the plaintiff did not, nor would, repair it; wherefore the defendants

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entered and repaired it. There is no allegation that the repairs were then immediately necessary; nor that the plaintiff was bound to repair; nor that he had received notice so to do; nor that a reasonable time for his performing the repairs had elapsed; nor even that the defendants, or any other persons, had occasion to use the harbour, and were prevented by the want of repairs from so doing. Upon the face of these pleadings, therefore, the defendants are mere volunteers, without any interest in the maintenance of the harbour or the pier, and without any title to do the acts which they have thus attempted to justify. For these reasons it seems to me that the defendants have not set up any sufficient answer to this action, and therefore that judgment ought to be entered up for the plaintiff on the second and fourth issues.

BAYLEY and HOLROYD, Js. concurred.

BEST, J.—I am also of opinion that these pleas cannot be supported. The soil and freehold in the locus in quo is admitted by both pleas to be in the plaintiff. A person cannot be justified in entering upon the soil and freehold of another, unless he has a right to do something upon it. It is said that these defendants had a right to enter the close in question, in order to abate a nuisance; but it appears to me that in this case such a plea will not avail the defendants. If it is to abate a nuisance which is dangerous to the public safety, and which requires immediate abatement, no demand is necessary; necessity will justify an immediate entry. But it does not appear in this case, that the defendants entry was rendered immediately necessary; and not being immediately necessary, they should have applied to the owner of the soil to give them the opportunity of doing what they did, before they could justify this trespass. The only case cited, which is at all like this, is that of trees growing over the highway, which is an act of negligence on the part of the owner, that might justify the cutting of the

overhanging branches. That would be a case of necessity not requiring notice; but here there is no necessity alleged which could justify the defendants in entering to repair without notice. For the reasons stated by my Lord Chief Justice, I am of opinion that judgment ought to be given for the plaintiff non obstante veredicto.

Judgment for the plaintiff.

SIMPSON *v.* POGSON and WIFE.

*Friday, Nov.* 14.

The creditor of an insolvent debtor, who has petitioned to be discharged under the Insolvent Act, obtains from his debtor whilst in prison a bill of exchange for his debt, and indorses it to an innocent holder for valuable consideration:— Held, that though this might be a fraudulent preference of the creditor, the insolvent's discharge was no bar to an action upon the bill by the innocent indorsee.

ASSUMPSIT upon a bill of exchange for 62*l.* 8*s.*, drawn by one Mr. *Faulkner*, upon and accepted by the female defendant before coverture, and indorsed to the plaintiff. Pleas, first, the general issue; second, the discharge of the acceptor under the Insolvent Debtor's Act, 1 *Geo.* 4. c. 119, and that such discharge still continues in force. Replication that the acceptor was not duly discharged, and issue thereon. At the trial before *Abbott*, C. J., at the *London* Sittings after last *Trinity* Term, the plaintiff had a verdict, subject to the opinion of the Court upon the following case:—

The acceptor of the bill in question, previous to her marriage with Mr. *Pogson*, being indebted to Mr. *Faulkner* in the sum of 66*l.* 8*s.*, accepted a bill of exchange for that amount, drawn on her by him, which fell due on the 19th *April*, 1821, and was dishonoured. On the previous 9th of *March* she was arrested for debt by one *J. C.*, and taken to prison. On the 28th of the same month she petitioned for relief under the Insolvent Act, and her petition was ordered to be heard on the 17th *May* following. In her schedule she inserted Mr. *Faulkner*'s debt. On the 5th *May*, while in prison, she gave Mr. *Faulkner*, in lieu of the first bill, the bill upon which this action is brought, and which he paid to the plaintiff for a valuable consideration. The second bill was not given in consequence of any threat used by *Faulkner*. He had three interviews with the acceptor in

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prison; at the first, no mention was made of renewing the bill; at the second, he requested her to give him a new bill, which she then declined, saying, she would consult her mother; at the third, the new bill was given. On the 31st of *May* she was taken before the Commissioners, who, after hearing her petition, ordered her to be discharged from the debts specified in her schedule. The plaintiff is a bonâ fide holder of the bill on which he sues, and had no notice of any of the circumstances above-mentioned.

*Curwood*, for the plaintiff, was stopt by the Court, who called upon

*Abraham*, contrà. This action cannot be maintained in point of law, because the granting a new security, pending imprisonment, to one particular creditor, is a fraud upon the other creditors, and is manifestly subversive of the object and policy of the statute. This was held with reference to a warrant of attorney obtained under circumstances analogous to the present, and there seems no reason why the doctrine should not extend to a bill of exchange. In *Jackson* v. *Davison* (a), it is said by *Bayley*, J., "It is part of the policy of the Insolvent Debtors' Act, that the property of the debtor shall be divided rateably among his creditors. Now, if this warrant of attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtor, which the legislature manifestly intended to be distributed among all the creditors." Now that reasoning, cogent and unanswerable as it is, is precisely applicable to the present case, and it seems impossible to distinguish the one from the other. This action therefore cannot be maintained, and the defendant is entitled to judgment.

(a) 4 B. & A. 691.

ABBOTT, C. J., was of opinion, that as the plaintiff was an immediate indorsee for valuable consideration, the action was maintainable.

BAYLEY, J.—There is one distinction between *Jackson* v. *Davison* and the present case, which entirely defeats the argument raised for the defendant, and enables us to hold this action maintainable, without in any degree breaking in upon the law as laid down in that case. Here the right and interest of a third person has intervened, and he is found by the case to be an innocent and bonâ fide indorsee; in the former case the action was brought by the creditor himself, to whom the fraudulent preference had been given, and the reasoning of the Court in their judgment on that occasion had particular reference to that fact. However improper the circumstances might be under which this bill was obtained from the insolvent, still, as the plaintiff had no knowledge of them, and is an innocent holder for a valuable consideration, he ought not to be deprived of the ordinary remedy which the law allows him to recover the money which he has advanced upon the bill. I am therefore of opinion that the judgment of the Court must be for the plaintiff.

HOLROYD, J. and BEST, J., concurred.

Postea to the plaintiff (*a*).

(*a*) Vide Bayley on Bills, p. 410, and the cases there cited. *Lucas* v. *Winton*, 2 Campb. 443. Chitty on Bills, p. 624.

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*Saturday, Nov. 15.*

Where a writ de contumace capiendo issued under 53 *Geo.* 3. c. 127, signified, "that the defendant was pronounced guilty of a contempt of the law and jurisdiction ecclesiastical, in not having obeyed a decree made upon him *to perform the usual penance* in the parish church of *St. M.*, in a certain cause of defamation;" and it appeared that at the time sentence was pronounced, a schedule of penance was made out, but which by the practice of the Ecclesiastical Court could not be delivered to the defendant until he had paid costs of suit:—Held, that he ought to have had the decree exhibited to him in its more perfect form, before he could be in contempt, especially as nothing was said in the significavit about costs.

## The King v. Henry Maby.

CHITTY had, on a former day, obtained a rule nisi for a habeas corpus to bring up the body of this defendant from the *Surry* county gaol, in order to be discharged from a commitment upon a writ de contumace capiendo, under stat. 53 *Geo.* 3. c. 127, for defects in the significavit and warrant thereon. It appeared from the significavit that the defendant had been "pronounced guilty of contumacy and contempt of the law and jurisdiction ecclesiastical, in not having obeyed a decree made by the ecclesiastical judge upon him, *to perform the usual penance* in the parish church of *St. Mary, Newington,* on a day long since past, in a certain cause of *defamation* heretofore depending in judgment before the said judge, between *M. M. Clifford,* wife of *J. M. Clifford,* and the defendant." The sheriff was therefore commanded to attach the body of the defendant until he should have made satisfaction for the said contempt. The objections to the significavit and warrant were, first, that it did not appear that the cause and matter for which the defendant had been committed was of ecclesiastical cognizance; for non constat that the defamation alleged was within the spiritual jurisdiction; and, second, that the sentence was uncertain, inasmuch as it did not appear what *the usual penances were,* which the defendant was required to perform before he became in contempt, which ought to have been specifically set out. He relied upon the 53 *Geo.* 3. c. 127, which gives a form in which the writ de contumace capiendo shall be drawn up; and referred to *Rex* v. *Eyre* (a), *Rex* v. *Smith* (b), *Rex* v. *Keat* (c), and *Rex* v. *Dugger* (d).

*Patteson,* on shewing cause now, was directed by the Court to confine himself to the second point; and in answer

(a) 2 Stra. 1067 and 1689.
(b) Id. 946.
(c) Id. 950.
(d) Ante, vol. i. 460. See *Carslake* v. *Mapledoram,* 2 T. R. 473; and *Ex parte Jenkins,* ante, 41.

to that he produced an affidavit, shewing, that according to the practice of the ecclesiastical court, the nature of the penance could not be stated in the significavit, inasmuch as before the schedule of penance could be extracted, the defendant should have paid the costs of the suit, and when that was done, the schedule would have been handed to him. In point of fact, at the time of sentence, the schedule of penance was made out, and it fully detailed how, where, and when the penance was to be performed; but the payment of costs was a condition precedent to the delivery of the schedule. This was the invariable practice of the Court, and therefore he submitted that this was an answer to the objection as to the uncertainty of the decree, as stated in the significavit.

Abbott, C. J.—I am of opinion upon the affidavit adduced in answer to this motion, that we ought to discharge this person out of custody. Taking the affidavit altogether, it appears that an imperfect decree has been pronounced. The decree is, that he is to perform "the usual penance." What the usual penance is does not appear. The affidavit shews that something more was to be afterwards done by the registrar, namely, to specify in the schedule what the penance was to be, as to time, place, and manner of performing it. The defendant ought to have had the decree exhibited to him in its more perfect form before he could be considered in contempt for disobeying it. There is nothing said in the significavit about the payment of costs. The contempt is not said to be for non-payment of costs, but for not performing the usual penance. The defendant ought to have been distinctly told what the penance was, and not left to find it out after he had done something else, namely, paid the costs.

*Patteson.* It appears by the affidavit that there was a schedule drawn up at the time the decree was pronounced.

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Bayley, J.—But the defendant could not see it until he had paid the costs. He ought to have had the decree exhibited to him in a more perfect form before he could be brought into contempt.

Holroyd and Best, Js., concurred.

Rule absolute.

The prisoner was brought up on a subsequent day and discharged.

*Saturday, Nov. 15.*

A conviction under 11 G. 1. c. 30, s. 16, for knowingly harbouring and concealing smuggled spirits, cannot be supported by evidence of finding the smuggled spirits concealed in the house of the party convicted, unless he was present at the time of finding, or some other direct proof be given of a guilty knowledge.

## *Ex parte* George Ransley.

Conviction under 11 *Geo.* 1. c. 30. s. 16, for knowingly harbouring, keeping, and concealing, and knowingly permitting and suffering to be harboured, kept, and concealed, three gallons and two quarts of foreign geneva, being run goods, &c. liable to the duties of excise, whereby defendant had forfeited the same, and also the sum of 100*l*. The conviction having been returned by certiorari into this Court, for the purpose of being quashed for informality, set forth the evidence upon which the convicting Justices acted; from which it appeared, that search having been made in the dwelling-house of the defendant for run goods, a half-anker of foreign geneva was found concealed in an inner room therein; that the defendant was not in the house when the search was made, but that his wife was present, and also two men, one of whom instantly left the premises upon the appearance of the searching officers; that the defendant, before the convicting Justices, in answer to the charge, did not produce any evidence, but insisted that the room in which the seizure was made, was detached from his dwelling-house, and had a door always left unlocked; whereupon the Justices found him guilty of the offence charged in the information, and adjudged him to have forfeited as abovementioned.

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*Platt* now moved to quash the conviction on two grounds; first, that on the face of the conviction there was not sufficient evidence to shew that the defendant had any knowledge of the geneva being in his house at the time of the seizure; and, second, that there was nothing to shew conclusively that the spirits seized were run goods. The words of the statute are, " In case any person shall *knowingly* harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, such prohibited goods, or run goods, liable to any duty or duties, &c. he shall forfeit, &c." Now, it must be shewn distinctly, first, that the party knowingly harboured, kept, or concealed, or knowingly permitted or suffered to be harboured, kept, or concealed the goods in question; and, second, that the goods so seized were prohibited, or run goods, liable to the duties of excise. In this case no such proof is set forth on the face of the conviction; on the contrary, the inference from the facts stated is, that the defendant was ignorant of the transaction; for he was not only not present in the house when the goods were seized, but another person was present, whose behaviour pointed him out as the offender, inasmuch as he ran away when the seizing officers made their appearance. Then, secondly, there is no evidence that these spirits were prohibited or run goods. The only ground for such an inference is, that the spirits were contained in a vessel called a half-anker. For any thing that appears, that vessel may have been innocently in the defendant's house, and the contrary not being clearly shewn, it cannot be presumed against the defendant.

*Copley*, S. G., shewed cause in the first instance. The evidence set out on the face of this conviction is quite sufficient to warrant the decision of the Justices. The goods were found in the defendant's house; upon general principles of law, that was primâ facie evidence that he knew they were there, and the onus lay on him to rebut that presumption; he did not rebut it, and therefore it became good evi-

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dence upon which to convict him. So, with respect to the second point, the half-anker was of itself presumptive proof that the spirits were smuggled, because it is itself an illegal vessel. [*Bayley*, J. It is not mentioned in any of the acts of parliament as an illegal vessel.] The quantity that it is known to contain being less than sixty gallons, is by the 23 *Geo.* 3. c. 70. s. 6. an illegal quantity; but independently of that, the evidence of the liquor being seizable was very strong; it was concealed in an inner room; the man who had the apparent custody of it ran away when the officers appeared; and the defendant himself, on his examination, endeavoured to colour the transaction by falsely asserting that the room was detached from his house.

*Platt*, in support of the motion. The argument in reply to the first point is answered by *Rex* v. *Chandler* (a), where *Le Blanc*, J. suggested as an objection fatal to the conviction in that case, that it was not stated that the defendant was either in the house, or near the spot at the time of the transaction. With respect to the half-anker, the statute cited does not specify that vessel as illegal, and its illegality cannot be presumed. [*Abbott*, C.J. One section of that statute throws upon the owner of the goods the onus of proving that they are legally in his possession, and in a legal vessel.] The 35th section does throw upon the person claiming restitution of spirits that have been seized, the burthen of proving that the duty has been paid; but the clause was made altogether alio intuitu, and cannot apply to the present case. [*Bayley*, J. Surely the character of the vessel is evidence pro tanto of the character of its contents; and it is clearly illegal to import spirits in so small a quantity as the half-anker contains.] Undoubtedly it is; but the mere possession, unexplained, of such a vessel, is not illegal.

ABBOTT, C. J.—Upon the whole we are of opinion, as to the first point, that the evidence set out is too slight to

(a) 14 East, 267. See also *Le Blanc*, J., in *Daniel* v. *North*, 11 East, 372, to the same point.

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found a conviction. The mere naked fact of the spirits being found in the defendant's house during his absence cannot be considered as conclusive evidence of knowledge to support a conviction on this statute. There is abundant ground for suspicion; but we cannot say that it is clear and satisfactory ground to convict. I therefore think that the Justices drew a wrong conclusion.

BAYLEY, J.—There must be some clear and satisfactory evidence that the party knowingly harboured or permitted the spirits to remain in his house.

HOLROYD and BEST, J.'s, concurred.

Conviction quashed (a).

(a) See *Rex* v. *Hale*, Cowp. 728. *Rex* v. *Smith*, 8 T. R. 588. *Rex* v. *Abbott*, Doug. 553; and *Ex parte John Smith*, ante, 461.

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TAYLOR *v.* WATERS.

*Monday, Nov.* 17.

Where in proceeding to outlawry one month had not elapsed between the *third* proclamation and the quinto exactus, pursuant to stat. 31 *Eliz.* c. 3. s. 1, the Court reversed the outlawry as a nullity, but in pursuance of the discretion given by the 6 *Hen.* 8. c. 4. reversed it only on the condition of the defendant putting in special bail to the original action, supposing the want of due proclamation to be only an irregularity.

MARRYAT, in *Trinity* Term last, having obtained a rule to shew cause why the outlawry issued against this defendant should not be reversed for irregularity, the Court referred it to the Master to inquire into the practice, and report thereon; and at the Sittings after that Term he reported as follows:—

"It appeared that the exigent issued 23d *March*; tested 12th *February* preceding; and returnable 17th *May*. Between the teste and return there were four days of exaction—25th *February*, 4th *March*, 22d *April*, and 6th *May*. It was objected, that as the first two of these days were previous to the issuing of the writ, though within the period of the teste and return, the proceedings were irregular; but I find that, according to established usage and practice, this is considered sufficient; there having been the proper number

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of exaction days between the teste and return, and the form of exaction being only general, and applicable to all causes without naming them. On 30th *May* an allocatur exigent issued, tested the preceding 20th; and this 20th was also a general exaction day, making the quinto exactus; and, according to the practice, this seems also sufficient. But a more doubtful question arises as to the proclamations. A writ of proclamation issued as the original exigent did, namely, 23d *March*, tested 12th *February* preceding, and returnable 17th *May* (which was regular); and proclamations were made under it on 4th *April*, 15th *April* (at the Quarter Sessions), and 2d *May*. Now the statute 31 *Eliz.* c. 3. directs, "that the sheriff shall make three proclamations in this form following, and not otherwise, namely, one in the open County Court; one other at the general Quarter Sessions of the Peace; and one other, one month at the least, before the quinto exactus." If the expression *one other*, lastly used, is to be construed as the third, or last, then there has not been a month between that proclamation and the quinto exactus, 20th *May*, and the outlawry is bad; but if the expression *one other* may refer to either of the former, then there has been a month, and the proceedings are sufficiently regular."

Upon this report the Court were of opinion that the language of the statute referred to the third and last proclamation; and therefore that the proceedings being irregular, inasmuch as a month had not intervened between the *third* proclamation and the quinto exactus, the outlawry must be reversed: but as it was reversed for irregularity only, they would not impose upon the defendant the necessity of putting in bail.

*Copley*, S. G., now mentioned the case again, and contended, that the plaintiff was entitled to have bail. The outlawry had been reversed on account of a deviation from the course directed by the 31 *Eliz.* c. 3; and therefore by the very terms of that statute it must be on the condition of the

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defendant putting in bail. Section 3 enacts, "that before the reversing of any outlawry, through or by want of any proclamation to be had or made according to the form of this act, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms, next after the avoiding of the outlawry." Now this outlawry has been reversed for want of the third proclamation, because the third proclamation, made irregularly as it was, must be treated as a nullity; and therefore by the precise terms of the statute, the defendant must put in bail. He cited *Sercole* v. *Hanson* (*a*), *Rex* v. *Yandell* (*b*), and *Volet* v. *Waters* (*c*).

*Marryat*, contrà. It cannot be said that there has been a want of proclamations in this case; the fault is, that they have been made out of their regular order. There is a wide distinction between the actual absence of any of the proclamations, and their being made in an inverted order. The latter, which is the present case, is a mere irregularity; for which, by the 6 *Hen.* 8. c. 4, the outlawry may be reversed, but without bail. That statute is not repealed by 31 *Eliz.* c. 3; and therefore the Court are authorised, if they think proper, to reverse the outlawry without imposing the terms of putting in bail.

ABBOTT, C. J.—I cannot concur in holding, that the error in this case was a mere irregularity in the order of the proclamations; because as the third proclamation was not made pursuant to the form prescribed by the statute, it must be considered in construction of law as a nullity. In that point of view the 31 *Eliz.* c. 3. is compulsory upon us to require the defendant to put in bail; but even if it could be said that this was a mere irregularity in the order of the

(*a*) 1 Wils. 3. 2 Sta. 1178. S. C. (*b*) 4 T. R. 521. (*c*) Ante, 55.

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proceedings, still, by the 6 *Hen.* 8. c. 4, we have a discretionary power to impose that condition upon the defendant. The outlawry must be reversed; but I am of opinion, that, independently of the statute of *Elizabeth*, we shall best exercise the discretion vested in us, by reversing it only on the condition that the defendant shall put in special bail to the action in the ordinary form.

BAYLEY, HOLROYD, and BEST, J.'s, concurred.

Rule absolute accordingly.



*Wednesday, Nov.* 19.

## The KING *v.* PINNEY and Another.

Where a local act of parliament, passed for regulating the affairs of the parish of *W.*, declared affirmatively that there should be two overseers nominated and appointed to succeed those who were in office at the time of the passing of the act:—Held, that the Justices might still appoint *four* overseers, under the authority of 43 *Eliz.* c. 2.

ON shewing cause against a rule nisi for quashing an order of Sessions, confirming an order of two Justices, dated 25th *March*, 1823, appointing four persons therein named, to be overseers of the poor of the parish of *Woolwich*, in the county of *Kent*, for the year ensuing; the case was this: By a local act, 47 *Geo.* 3. sess. 2. c. 111, for regulating the affairs of the parish of *Woolwich*, it was enacted by s. 92, "that the then overseers of the parish, should continue to be overseers for the remainder of the year 1807, and until *two other overseers* should be nominated and appointed, in the manner and at the time by law directed to succeed them; and that in *Easter* week, or within one month after *Easter* in every year, *two persons*, being substantial householders in the said parish, should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish;" and two Justices having appointed *four overseers*, the question was, whether such appointment was authorised by the act.

*Bolland* (with whom was *Andrews*), in support of the order of Sessions. The statute on which this question

arises, does not restrain the discretion of the Justices as to the number of overseers which shall be appointed. Two at least are to be appointed, but there is nothing to prevent the appointment of more. There are no words to be found in the act which take away the power given by the 43 *Eliz.* c. 2, as to the appointment of overseers. Undoubtedly it was decided in *Rex* v. *Loxdale* (*a*), that more than four overseers cannot be appointed under the statute of *Elizabeth*. The doctrine there laid down is, that as the statute speaks of four, three, or two, it must be taken that the legislature intended that no more than four, and not less than two should be appointed, and consequently an order appointing five, could not be valid. Now here, though the local act gives the power of appointing two, at least, still there is nothing to prevent the Justices in exercising their discretion by the appointment of four. This is a very large and populous parish, and there is great reason for giving this liberal interpretation to the statute. Before the passing of the act, it is clear that more than two might have been appointed, and unless there are express words to be found, which deprive the Justices of the power given by the statute of *Elizabeth*, this order appointing four, is perfectly valid.

*Scarlett* and *Adolphus* contrà. The argument on the other side, proceeds on the supposition, that the words of the local act are, "two *or more*." There is nothing to support that proposition. The statute expressly says, that *two* shall be nominated and appointed; and the 92d section actually refers to the jurisdiction exercised by the Justices under 43 *Eliz.*; so that it limits the power of appointment to the number of two. Therefore if no more than two are to be appointed, it is clear that an appointment which exceeds that number, must be bad.

(*a*) 1 Burr. 445.

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Abbott, C. J.—The general rule of construction, as laid down by Lord C. B. *Comyn* (a), is, that affirmative words in a later statute, do not repeal a prior statute, unless there is something in the later which necessarily leads one so to understand it. One of the instances given is this:—"The stat. 23 *Eliz.* which gives 20*l.* a month against a recusant, does not take away the penalty of 12*d.* for every *Sunday* given by 1 *Eliz.* 2. But where affirmative words in sense, contain a negative, as where a new ordinance is made, which directs the form or order of the proceedings, it shall be otherwise." If the two cannot be reconciled, the later must prevail; but if they are not inconsistent, the aflimative words in the later statute do not repeal the former. I see nothing in this statute inconsistent with the 43 *Eliz.* which is the general law of the land, and enables the Justices to appoint four, three, or two overseers. Before the passing of this later statute, the parish of *Woolwich* might have had more than two overseers. The statute says affirmatively, that there shall be two, and there is a provision that the Justices shall regulate the appointment with reference to the statute of *Elizabeth*. Two, at all events, are to be appointed, but I do not see why the Justices may not appoint four. The statute does not say that there shall be two and no more, or two only; but that there shall be two. The Justices must appoint two; but still I do not see why they may not appoint four.

Bayley, J.—This act does not take away from the Justices the power of appointing the same number of overseers which they might have done had the act not been passed. It is perfectly clear, that before this act, they might have appointed four, three, or two. They must have appointed two at the least; and then this act says, that the then present overseers shall continue in office until two be appointed, that is, until two at the least be appointed; and it provides,

(a) Com. Dig. tit. *Parliament*, R. 25. Vide Plowd. 112, 113. and 3 P. Wms. 461.

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that in *Easter* week, or within one month afterwards, two persons shall be appointed. It does not say two and no more, but two at the least. There being nothing, therefore, in the act which shews that the intention of the legislature was to confine the number to two; I think we are not warranted in saying that the statute has excluded the power which the magistrates had of appointing four, three, or two.

Best, J. (*a*), concurred.

Rule discharged.

(*a*) *Holroyd*, J. was absent in the Bail Court.

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*Wednesday, Nov. 19.*

## The King *v.* The Rev. A. Collett, Clerk.

Quære, Whether able-bodied persons, thrown out of their ordinary employment, and in consequence thereof unable to maintain themselves and families, are entitled to parochial relief *in money* as *impotent* poor, within the meaning of 43 *Eliz.* c. 2. s. 1.

It is the bounden duty of overseers to endeavour to find employment, either in or out of their own parish for able-bodied poor persons thrown out of their usual work; and it seems that it is only in the event of such employment not being to be found, that they are authorised in giving pecuniary relief.

THIS was an appeal against an order of two Justices, for the allowance of the accounts of the overseers of the poor of the parish of *Kelsale*, in the county of *Suffolk*; which order the Sessions confirmed, subject to the opinion of this Court, upon the following case:—

The appellant, Mr. *Collett*, is the proprietor of a considerable estate in the parish of *Kelsale*, a part of which is in his own occupation. In consequence of the extreme depression in the price of agricultural produce for the last two or three years, the farmers have been rendered unable to make any improvements on their lands, and consequently have employed very few laborers, by which means a considerable part of the laboring population has been totally unemployed, and during this period, all poor persons belonging to the parish, who have been unable to obtain employment, have received sums of money for their maintenance from the parish officers in proportion to the number of their respective families, for which no labor has been required from them. The appellant being dissatisfied with this application of the parish funds, appealed against the overseers' accounts. The respondents, upon the hearing of this appeal, admitted that the persons to whom the sums objected to in the account were paid, were in fact both able and willing to work, but that no employment could be obtained for them, which the appellant contended, the overseers were bound to provide, pursuant to the statute 43 *Eliz.* c. 2, although no evidence was adduced to prove that the overseers could have employed the laborers. It also appeared, that none of the sums objected to were paid under, or in consequence of, any orders from a magistrate. The parishioners were accustomed to meet once a week at the parish workhouse, at which meetings all applications for relief were received, and where all laborers belonging to the parish, who had not in the preceding week been in constant

employment, attended to give an account of their earnings, and received such sums as, with the earnings, should amount to a sum deemed competent to their maintenance, in proportion to the number of their children. In several cases it appeared, that able-bodied men with four or five children, having had no employment in the preceding week, received from the overseers from 7*s.* to 8*s.* 6*d.* per week; having been employed three days, 3*s.* 6*d.* to 4*s.* per week; having been employed two days, 5*s.* per week, and so in proportion to the number of their children, and the amount of their week's earnings. And in all cases this relief was afforded to these persons, solely on the ground of their having been out of employment, without reference or inquiry as to any means they might have of raising money for the supply of their immediate wants by sale or pledge of their household effects; and that in many instances the weekly relief was afforded to various able-bodied laborers for many weeks in succession.

The case was first argued at the Sittings after last *Trinity* Term, when a question arising whether any of the payments had or had not been made under a magistrate's order (which fact did not then appear upon the statement of the case), it was ordered to be sent back to the Sessions for the purpose of being amended, and to stand in the paper for further argument, before the full Court, in the ensuing Term; and

*H. Cooper* and *B. Andrews* now appeared to support the order of Sessions. Upon this case, as now amended, there are three questions for the decision of the Court, first, whether able-bodied persons out of employment, and in consequence unable to provide for themselves and families, are entitled to relief at all under the provisions of the 43 *Eliz.* c. 2; second, assuming them to be entitled to relief under such circumstances, whether they are entitled in any other manner than by setting them to work upon a stock of ma-

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terials to be provided by the parish officers; and third, whether they are entitled to any relief without a specific order from a magistrate for that purpose. Upon the first point, it is clear, that by the 43 *Eliz.* c. 2. s. 1, overseers are empowered to relieve able-bodied persons who are unable to obtain work. That section enacts, that it shall be lawful to raise competent sums of money "for and towards the necessary relief of the lame, *impotent*, old, blind, and such other among them, being poor and not able to work." Now the able-bodied man who cannot find employment, is as much *impotent*, in the fair and ordinary sense of that word, as he who is disabled from working by bodily infirmity; the effect produced upon him is the same; he is reduced to the same necessity for relief; and therefore the proper and natural construction of the word in the act of Parliament is, that such person is entitled to relief as impotent. But there is an express authority for this construction, *Waltham* v. *Sparks* (a), where it is said by *Eyre*, J. that a person having more children than he can maintain, is *impotent*, as much as if he had been so by lameness. And indeed, any other construction would be equally unjust towards the individual, and injurious to society at large; for the effect of it would be, either to leave the pauper to perish, the victim of distress which he had not occasioned, and could not prevent; or to drive him to the commission of crimes which would eventually burthen the public, first, with the expences of his prosecution, and next with his maintenance in a prison. Here then, is an express decision in favor of this construction, without any reason or argument against it; and the same view of the subject seems to have been taken by the legislature in more recent times; for in the preamble of the 8 & 9 *W.* 3. c. 30, the *want of work* is specifically recognised as a ground for relief; for it says, "forasmuch as many poor persons *chargeable to the parish* where they live, *merely for want of work*, would in any other place, where sufficient employment is to be had,

(a) Skin. 556. Comb. 320. S. C.

maintain themselves and families," and then proceeds to provide the means of obtaining such employment, by authorising such persons to reside in another parish under a certificate. Again, the 9 *Geo.* 1. c. 7. s. 1, provides, "that no Justices of the Peace shall order relief to any poor person dwelling in any parish, until oath be made before such Justice, of some matter *which he shall judge to be a reasonable cause or ground* for having such relief." There is no enumeration here of the causes or grounds of relief; the magistrate is empowered to exercise a discretion upon the subject, and the inference is strong, that want of work was intended to be included, because it is impossible to say that it is not a reasonable ground for relief. Upon the second point, overseers may relieve able-bodied persons by other means than obtaining employment for them, or providing a stock of materials and setting them to work themselves; in other words, they may relieve them *in money*. The old system of providing a stock of materials for the employment of the poor, has been for many years disused, except in parishes where a workhouse is maintained. Nor has this been done without reason. In the time of *Elizabeth*, when that method of providing work was suggested, the articles manufactured by the poor could command a sale; but in the present improved state of the manufactures throughout the country, there is no market for such articles, and the money expended in their production would be only a burthen upon the parish, without the least chance of any return. This change is also warranted by the language of the 43 *Eliz.* c. 2. s. 1. which evidently gives the overseers a discretion as to the adoption of the plan which it suggests; for it is there said, "the churchwardens and overseers shall *take order* from time to time, by and with the consent of two or more Justices of the Peace for the county, for setting to work the children of all such whose parents shall not by the said churchwardens or overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all

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such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by." Here is a discretion allowed, first, in the overseers, and secondly, in the Justices; for it is clear, that the expression "take order," means, that such persons only shall be set to work as the overseers and Justices shall in their *discretion* think fit objects for such a plan. But assuming that this statute is imperative in its enactment, still the violation of it cannot deprive the poor of their right to relief; the parish officers may be indicted for their disobedience, but the poor cannot be prejudiced in the interval. On the other hand, the usage has been now for a long series of years established of relieving the poor in money, and that usage has not grown up without strong authority in its favor. If it be illegal to relieve with money those who are entirely out of employment, à fortiori, so to relieve those who have employment, but who still cannot earn sufficient for the maintenance of themselves and their families, must be illegal also. But how does the law stand upon this point? By the 9 *Geo.* 1. c. 7. s. 2, it is provided, "that no officer of any parish shall, (except upon sudden and emergent occasions) bring to the account of the parish, any *monies* he shall give to any poor person of the same parish, who is not registered in such book or books to be kept by the said parish, as a person entitled to receive collections, on pain of forfeiting the sum of 5*l*." This is a full and unqualified recognition of a then existing right to relieve the poor in "monies," not "monies laid out *for materials*," but money to purchase the necessaries of life; not confined to the persons described in the previous statute of 43 *Eliz.* c. 2., but applied to poor persons generally. A like power is recognized in the 36 *Geo.* 3. c. 23. s. 1, which declares, "that it shall be lawful for the overseers of any parish, with the approbation of the parishioners, or the majority of them, in vestry or other usual place of meeting assembled, *or*, with the approbation in writing of any of his majesty's justices of the peace acting for the district, *to distribute and*

*pay* collection and relief to any industrious poor person or persons, at his, her, or their homes, under certain circumstances of temporary illness or distress." It is impossible that the words "distribute and pay," can mean any other than a supply of *money*, and therefore the authority to relieve with money becomes clearly established. Then, are able-bodied persons out of work, proper objects of pecuniary relief, within these statutes? It has been already shewn, that they are so, within the 9 *Geo.* 1. c. 7. ss. 1 & 2; it only remains to examine the language of the 36 *Geo.* 3. c. 23, with reference to this case. The persons relieved in this particular parish were undoubtedly persons "under circumstances of distress," for it appears that they had no possible means of subsistence except the relief they received. But was it "temporary distress?" The case, indeed, finds that some of them were relieved for many weeks successively, but their distress was not therefore the less temporary. The relief was given weekly; it alleviated the distress of one week, and at the expiration of that period a new distress occurred, a new ground for relief presented itself, and new relief was afforded: each week's relief, therefore, was given to a "temporary distress." Then, upon the third point, overseers may relieve without the order of a magistrate. To support this position, it is only requisite to refer again to the statute last cited, 36 *Geo.* 3. c. 23. s. 1. That is in the alternative; the money is to be paid, either "with the approbation of the parishioners," or "with the approbation in writing of any justice of the peace." Now in the present instance, the former of these alternatives has been complied with in the strict letter of the act; for the case finds, that the parishioners met weekly at the workhouse, and there received applications for relief, and there gave orders for that relief to be administered. And this was the best possible course to be pursued; the parishioners are better judges than the magistrates can be, when, and in what proportions, relief is necessary; and they are the most proper persons to superintend its distribution, be-

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cause the burthen of the payment rests upon them, and they have at once the strongest interest, and the best opportunities for seeing that the money which they contribute to raise is not misapplied. Upon all these grounds, therefore, these accounts were properly allowed, and the order of Sessions ought to be confirmed.

*Scarlett* and *Eagle*, contrà. The mode of relief which gave rise to this appeal, is as manifestly opposed to public policy, as it is decidedly in violation of the law. The 43 *Eliz.* c. 2. does not authorise parish officers to administer pecuniary relief to paupers who are able to work, except through the medium of labor, nor is there any prior or subsequent statute which sanctions the practice. An opinion has generally obtained, that the legislature never interfered to make any provision for the relief or support of the poor, previous to the statute of *Elizabeth*; that is, however, a mistaken idea; there are many such statutes long antecedent to the 43 *Eliz.* (*a*); but in none will it be found, that any power is given of relieving in money those who are able to work. That statute certainly comprehends all that preceded it, but upon a careful review of all the previous acts, no one section or phrase can be discovered, upon which even an hypothesis can be founded, that any description of poor are entitled to relief, but as the reward of labor, excepting only those who are incapacitated from labor, by bodily, or rather physical, infirmity. The 43 *Eliz.* c. 2. seems, however, to have been principally framed upon the 5 *Eliz.* c. 3. the object of which is stated in the preamble to be, "that idle and loitering persons, and valiant beggars be avoided, and the impotent, feeble, and lame, which are the poor in very deed, should be hereafter relieved and well provided for." It then proceeds to state specifically what relief and provision shall be made for such

(*a*) Vide 22 H. 8. c. 12. 27 H. 8. c. 25. 1 Edw. 6. c. 3. 3 & 4 Edw. 6. c. 16. 5 & 6 Edw. 6. c. 2. 2 P. & M. c. 5. 5 Eliz. c. 3. 14 Eliz. c. 5. 18 Eliz. c. 3. 39 & 40 Eliz. c. 3.

persons, and how it shall be applied; namely, "that a book shall be kept, in which the names of all householders and inhabitants shall be entered; also the names of all such impotent, aged, and needy persons which are not able to live of themselves, nor with their own labor; for them a collection is to be made, and the parson and churchwardens are to appoint two able persons to be gatherers and collectors, and the collection is to be distributed to the said poor and impotent persons, after such sort, that the more impotent may have the more help, and such as can get part of their living, to have the less, and by the discretion of the collectors, to be put in such labor as they be fit and able to do." The import of this passage is perfectly clear, and throws great light on the whole subject. It shews that the main object and design of the legislature was, that those who were utterly incapable of work should be supported and maintained by pecuniary aid, and that those who were capable of bodily labor, in however small a degree, should be compelled to perform such work as was within their power. Thus the law stood until the 43 *Eliz.* c. 2. s. 1, which enacted, "that the overseers should raise weekly or otherwise, by taxation, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, and to do and execute all other things, as well for the disposing of the said stock, as otherwise concerning the premises as to them shall seem convenient." It has been argued that the modes of labor pointed out by this section have ex necessitate fallen into disuse, the general improvement in all kinds of manufacture having rendered such a plan no longer practicable. But the statute does not confine the overseers to the adoption of those particular trades which it enumerates; on the contrary, it gives them a general discretionary power to select such others as may be more expedient; and therefore it is their duty, if one

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department of labor has, by the change of times and manners, become ineffective and unprofitable, to select another, which it is even yet in their power to do. Adhering, however, closely to the letter of this statute, it is by no means necessary to say that the man who is physically capable of work is to be left to perish, merely because he cannot find employment; it is granted that such a man is entitled to relief; it is only insisted, that the relief must be through the medium of industrious labor. It has been contended, that under the proper construction of the word "impotent," all those must be comprehended, who are, from any local or external cause, unable to procure employment; and a dictum of *Eyre*, J. in the case of *Waltham* v. *Sparks* (*a*), has been relied on. But that dictum was wholly extra-judicial, and uncalled for by the case itself, which, upon a close inspection, will not be found by any means to sanction the inference thus attempted to be drawn from it. The 43 *Eliz.* c. 2. itself, seems to dictate the opposite conclusion, for in s. 7, it imposes upon the relatives "of every poor, old, blind, lame, and impotent person or other poor person not able to work," the burthen of relieving and maintaining such. There are also several cases in which this question has been, if not expressly decided, at least considered in a manner almost conclusive of the construction now contended for. In *Rex* v. *Gulley* (*b*), an order upon a parishioner to maintain his daughter, "being in a poor destitute condition," was held insufficient, for not stating that the pauper was "lame, blind, or unable to work." Again, in the case of a complaint that the pauper was "impotent and deserted," and where the magistrates made an order upon the father to contribute a weekly sum towards her support, that order was afterwards quashed, because it was not "adjudged," that the pauper was "impotent," *Rex* v. *Litton* (*c*); and both these decisions were afterwards reviewed and confirmed in *Rex* v. *Hayworth* (*d*), *Rex* v. *Tip-*

(*a*) Skin. 557. Comb. 320. S. C.
(*b*) Foley, 17. 1 Bott, 366. S. C.
(*c*) 1 Bott, 366.
(*d*) 1 Stra. 10. 1 Bott, 402. S. C.

*per* (*a*), and *Rex* v. *Stoke Ursey* (*b*). It is worthy of remark, that the first and seventh sections of the 43 *Eliz.* c. 2, though applying to very different cases, the one to the persons who shall receive pecuniary relief from the overseers, and the other to those who shall be relieved or maintained by their relations, still adopt the same identical words; for the persons described in both are, "the poor, old, blind, and impotent." It has been already shewn by the several cases cited, that an order upon an individual for the maintenance of a pauper is bad, unless it specify that the pauper is "impotent," and therefore it is impossible to suppose that a different rule would be held applicable to an order for relief upon overseers. The next succeeding statute is the 13 & 14 *Car.* 2. c. 12, section 3 of which, after enacting that persons may go into any parish to work, carrying with them a certificate from the parish to which they belong, proceeds thus: "if they shall not return when their work is finished, or shall fall *sick or impotent* whilst they are in the said work, it shall not be accounted a settlement, but they may be removed to the place whence they came; and if the churchwardens and overseers of the poor of the parish to which such persons shall be removed, refuse to receive them, *and to provide work for them* as other inhabitants of the parish, they shall be subject to indictment." From which two things are clear; first, that the legislature there used the word "impotent" to signify those who were physically incapable of working; and second, that they meant to impose on the parish officers the duty of finding work for those who were not able to find it for themselves. The 8 & 9 *W.* 3. c. 30. has been cited as a recognition of the title of persons out of work to relief, as such; but it by no means goes that length. It recites, indeed, a melancholy truth, that many persons become chargeable to their parishes for want of work, and directs that such persons shall be supplied with work as the means of obtaining relief, but it does not any where confer upon the parish

(*a*) 1 Bott, 403, n. (*b*) Id. Ibid.

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officers the power of relieving in money without first putting the party to work. The whole of that statute seems to proceed upon the principle now contended for, that those who do not work, being able, are not to eat; and the second section studiously, and in terms, lays down that principle, for it declares the object of the former section to be "that the money raised only for the relief of such as are *as well impotent as poor*, may not be misapplied and consumed by the idle, sturdy, and disorderly beggars;" and, as one mode of identifying the proper objects of relief directs, that every person being registered in the collection books, and receiving relief, shall wear a badge, prohibiting the overseers from relieving any person not so wearing a badge, under a penalty of 20*s*. Antecedent, however, to this statute, was the 3 & 4 *W.* & *M.* c. 11, in the mis-construction and perversion of which originated the unfortunate system now in operation, and the effects of which are so burthensome to the country. The 11th section of this act deserves particular observation. It begins by reciting the inconveniences resulting from a misapplication and undue extension of the "power of the churchwardens and overseers of the poor," which it declares to be "contrary to the true intent of" the 43 *Elizabeth*. Now it has already been shewn, that the power of relief given by the 43 *Eliz.* applied to the impotent only. That statute had several other objects in view, such as the providing work for the poor, the compelling them, by the interposition of the magistrates, to do work, the binding out poor children apprentices, and the raising of rates for the relief and maintenance of the poor; and every one of those acts is directed to be done by the co-operation, and consent, and authority of the magistrates: the only act which it empowered the overseers to do exclusively, and upon their own single authority, was the affording pecuniary relief to the impotent poor. The power thus conferred, became abused, and the 11th section of the 3 *W.* & *M.* c. 11, goes on to prescribe a remedy, and after providing that correct lists shall be from time to

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time made of the persons entitled to relief, directs, "that no other person be allowed to have or receive collection at the charge of the said parish, but by authority, under the hand of one justice of peace residing within such parish, or (if none be there dwelling) in the parts near or next adjoining, or by order of the justices in their respective Quarter Sessions, except in cases of pestilential diseases, plagues, or small pox, for and in respect of such families only as are or shall be therewith infected." The effect of that clause is, that except in the cases specifically excepted, no pecuniary relief shall be given without the consent of the parishioners on the one hand, and the authority of a magistrate on the other. Instead of this, the mischievous practice has been, that the pauper applies to a magistrate, who makes an order for relief as a matter of course, without knowing any thing of the real merits of the case, and without consulting the parishioners, and under that order the overseers act. This is a clear violation of the statute, and it is still more clearly proved to be so, by the 9 *Geo.* 1. c. 7. s. 1, which, after reciting this very grievance, enacts, "that no justice of the peace shall order relief to any poor person dwelling in any parish, until oath be made before such justice of some matter which he shall judge to be a reasonable cause or ground for having such relief, and that the same person had, by himself, herself, or some other, applied for relief to the parishioners of the parish, at some vestry or other public meeting of the said parishioners, or to two of the overseers of the poor of such parish, and was by them refused to be relieved, and until such justice hath summoned two of the overseers of the poor, to shew cause why such relief should not be given, and the person so summoned hath been heard, or made default to appear." Unfortunately, that section does not require that the magistrate thus applied to shall be resident within the parish, or its neighbourhood, and that omission has opened wide a door to fraud, because the pauper frequently applies to a magistrate resident at a great distance, the overseer neg-

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lects to appear before him, and thus the order for relief is obtained without any examination of the claim of the party receiving it. But the subsequent parts of this statute are very important, and are evidently in aid of the original design of the 43 *Eliz.*, namely, to secure the means of finding employment for the poor, instead of relieving them in the first instance with money. Section 4 empowers the parish officers to provide houses "for the lodging, keeping, maintaining, *and employing*" their poor, and declares, that those who refuse to enter the houses shall not receive relief; which is in substance a declaration that the overseers shall not have power to relieve, except by finding employment, and that those poor who are able, but not willing, to work, shall not be entitled to any relief. The 36 *Geo.* 3. c. 23, in some degree altered the regulations of the 9 *Geo.* 1. by empowering the overseers to relieve poor persons at their own houses; but with this limitation, namely, "in temporary illness or distress." The want of employment described in the present case, can hardly be called "distress," within the meaning of that clause; but at any rate it cannot be called "temporary distress." The word "temporary" there means sudden and unforeseen distress, and cannot possibly apply to persons who, in the language of the case, are "able-bodied laborers," to whom "weekly relief was afforded for many weeks in succession." The 22 *Geo.* 3. c. 83, may also be referred to, as shewing the unceasing anxiety of the legislature to relieve the poor by means of employment only; for the 17th section empowers overseers to provide "utensils and materials necessary for their employment;" the 32d points out the mode of providing employment for those poor persons who are unable to procure it themselves; and the 35th authorises magistrates "to order the guardian to procure maintenance and employment" for persons so situated. From a review, therefore, of all the acts of parliament, the result appears to be this, that it is the duty of the overseers to procure employment for all those who are able to work, and that they cannot legally

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relieve such persons by any other means. This was the spirit and object of the 43 *Eliz.*; the same spirit and object appears in every subsequent statute; that object has been defeated by the mode of relief pursued by the overseers in this case, and therefore upon that ground these accounts are clearly objectionable, and ought not to have been allowed. [*Bayley*, J. Suppose the overseers are unable to procure employment for the poor, what course are they then to adopt?] That question does not arise, because it does not appear by the case that these overseers were unable to find employment for the poor, nor even that they made the slightest attempt to obtain it, either in or out of this parish, which it is submitted they ought to do, before they can be authorised to distribute pecuniary relief.

Abbott, C. J.--We are of opinion, that this case ought to go down again to the Sessions, in order that we may be informed, one way or the other, whether the overseers did or did not endeavour to find employment for the poor of this parish, and whether, notwithstanding their endeavours, they were unable to find work for them. Until that fact appears distinctly on the case, one way or the other, we cannot decide the question intended to be submitted for our consideration. Having said thus much, I wish it, however, to be distinctly understood, that upon a question like this, so deeply affecting the public interest, and upon which the public mind may be so much agitated, we have not as yet pronounced any opinion that parish officers are not bound to afford pecuniary relief to poor persons, for whom no employment can be found. As yet the Court has pronounced no opinion one way or the other upon that point. The only opinion which they give is, that it is the duty of the overseers, in the first instance, if they can, to provide employment for the poor, and I, for one, give that opinion for the sake of the poor themselves, being most perfectly convinced, that it is more for their advantage that they should maintain themselves by industrious labor, than receive pecuniary

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relief without employment. Before we can come to any satisfactory judgment upon the question intended to be raised, let us be distinctly informed, whether any and what steps the parish officers have taken, both within and without this parish, to find employment for the poor.

Bayley, J. suggested, that it was the bounden duty of the overseers to obtain work for the poor if they could, either in or out of their own parish, and it was only in case of inability to procure work, that they would be justified in giving relief in money. Probably this very discussion would rouse overseers of the poor to a sense of their duty in endeavouring to find work for unemployed poor persons. There were several useful modes of employing poor persons, advantageous to the public, such as levelling hills, and improving roads. Within the last few years, a great deal had been done in improving the public highways by this mode of employing poor laborers.

The case was sent back to the Sessions to be amended.

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*Friday,* *Nov.* 21.

## Archer v. Pritchard.

A rule to appoint auditors in an action of account, is absolute in the first instance; and the Court appointed two of its principal officers to be the auditors.

This being an action of account, and judgment quod computet having been given for the plaintiff, *Chitty* moved the Court to appoint auditors pursuant to the practice in this form of action, and it becoming a question whether by the practice of the Court, the rule was absolute in the first instance, or only nisi,

The *Master* certified that the practice was to make it absolute in the first instance, and

The Court made it absolute accordingly, and, upon the authority of *Smith* v. *Smith* (*a*), appointed Masters *Le Blanc* and *Chapman* to be the auditors.

(*a*) 2 Chit. Rep. 10. Vide 3 Wils. 73. 88. 89.

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*Friday, Nov. 21.*

PURDOM *v.* BROCKBRIDGE.

A defendant having been charged in execution upon a judgment, the plaintiff's attorney filed the committitur piece with the clerk of the dockets, pursuant to the rule *Easter*, 41 *Geo.* 3, but the latter having neglected to enter it on the judgment roll within the time prescribed by the rule, the Court ordered the prisoner to be discharged, though there was no default in the plaintiff's attorney.

*ARCHBOLD*, on a former day in this Term, had obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the committitur on the judgment had not been entered on the judgment roll within the period prescribed by the rule of the Court of *Easter* Term, 41 *Geo.* 3, which stated, "that from and after the first day of *Trinity* Term next, every committitur on every judgment obtained, or to be obtained in this Court, against any prisoner or prisoners, shall be filed with the clerk of the dockets of this Court, on or before the last day of the Term, in which such prisoner or prisoners is or are to be charged in execution; and the clerk of the dockets shall enter such committitur on the judgment roll within four days next after the end of such Term, exclusive of the last day of the Term, unless the last of such four days be *Sunday*, and in that case, within five days next after the end of such Term; and that in default thereof such prisoner or prisoners shall be entitled to be discharged." (*a*) In this case, the verdict against the defendant was obtained at the *London* Sittings before last *Hilary* Term; in the course of that term he was rendered by his bail, and in the ensuing *Easter* Term he was charged in execution in the present action by rule of Court, upon the acknowledgment of the Marshal that he then had him in his custody; but the committitur was not entered on the judgment roll until after the end of the ensuing *Trinity* Term.

*Rotch* now shewed cause against the rule, and produced an affidavit by the plaintiff's attorney, stating that the committitur piece was duly filed with the clerk of the dockets before the last day of *Easter* Term. He contended that the plaintiff had done all that the rule called upon him to do; the committitur, through some error, certainly had not been

(*a*) Vide 1 East, 405. 410.

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entered upon the roll, but that was the default of the officer of the Court, which the plaintiff could not possibly prevent, and for which he ought not to be held responsible. He also referred to the rule of Court of *Easter* Term, 3 *Geo.* 4. (*a*), which provided, that after notice given by prisoners to plaintiffs of their intention to apply for their discharge under the Insolvent Debtors Act, "no prisoner shall be superseded or discharged out of custody at the suit of such plaintiff by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by this court, or one of the Judges thereof." This rule, he contended, had a general application, and would therefore deprive the defendant of any benefit otherwise arising to him from default in the plaintiff's proceedings.

*Archbold*, contrà, insisted, that although it was the duty of the clerk of the dockets to enter the committitur on the roll, yet it was also the duty of the plaintiff's attorney to see that it was done.

PER CURIAM.—The rule of Court upon which this motion was obtained, is express and unequivocal in its provisions, and we have no discretion in applying it to the present case. The directions of the rule have not been obeyed, and therefore the prisoner must be discharged; for upon the present motion, we cannot inquire where the default originated. With respect to the rule of Court last cited, that was made altogether alio intuitu, and has not the slightest bearing upon the present case. This rule must be made absolute, but under the circumstances, we think it should be without costs.

Rule absolute for discharging the prisoner out of custody, without costs (*b*).

(*a*) Ante, vol. i. 472.

(*b*) Vide *Fotterell* v. *Philby*, 3 Burr. 1841.

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*Saturday, Nov. 22.*

In the Matter of STEPHENS.

Prisoners found gambling in the King's Bench prison, are liable to be punished in the discretion of the Court.

*CAMPBELL*, on a former day, obtained a rule to bring up *James Stephens*, and eight other persons, confined as prisoners for debt in the King's Bench prison, to answer the matters of an affidavit; and also to shew cause why they should not be removed to the county gaol of *Surry*, for having been found gambling in the said prison. The rule was granted on the affidavit of *William Jones*, Esq. the Marshal, and two of the turnkeys. It was stated by the former, that in consequence of information communicated to him, that a gaming table was kept in one of the rooms of the prison, in which *Hazard* was frequently played, from midnight until six in the morning, he gave directions to the other deponents to search the said room, and prevent such practices. The other deponents stated, that between twelve and one o'clock on the morning of the 17th *November*, they searched the room of the prisoner *Stephens*, and detected him and the several other persons named in the affidavit, in the act of playing at dice.

The prisoners were this day brought into Court, and after hearing *Denman*, C.S. *Andrews*, and *Chitty*, for different prisoners, and *Copley*, S.G., in support of the rule,

ABBOTT, C. J., said, this is the first occasion that a matter of this nature has been presented to the notice of the Court. We hope that the practice complained of has not been of long prevalence within the walls of this prison, and we trust that a lenient treatment of the persons now brought before us may be sufficient to put down a practice so highly prejudicial to the good government of the prison. If it cannot be put down but by severity, it is to be understood that the Court has power to inflict serious punishment in cases of this nature, and they must resort to extremities if this practice

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shall be continued. In the present instance, however, the order of the Court is, that *James Stephens*, the keeper of the room, (who stands in a very different situation from the other prisoners), be confined alone in the strong room of the King's Bench prison for one month, and that the Marshal do not allow to the other persons (except one, who has since been discharged under the Insolvent Act), or any of them, the benefit of the rules of the prison for one month. With respect to the excepted person, the order of the Court is, that he do enter into his personal recognizance in the sum of 40*l.* to be of good behaviour for six months.

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*Monday, Nov.* 24.

## DONE *v.* SMITH.

An insolvent debtor who has been arrested, and given a bail bond, for a debt contracted before his discharge under 1 *Geo.* 4, c. 119, must plead to the action; the Court having no power to relieve him on motion, either by setting aside the proceedings, or ordering common bail to be filed. If he is detained in custody, it is otherwise.

D. *F. JONES* moved to set aside the proceedings on the bail bond given by the defendant in this case. The defendant having been indebted to the plaintiff, who was in partnership with a person named *Ball*, gave a bill for the debt to the plaintiff, payable to the partnership account. The defendant afterwards became embarrassed, and applied under the Insolvent Debtors' Act, 1 *Geo.* 4. c. 119, to be discharged. In his schedule he inserted the plaintiff and *Ball* as his creditors on the bill in question. Having obtained his discharge, the plaintiff, to whom the bill was given on the partnership account, afterwards brought the present action against the defendant upon the bill, treating it as a separate debt. The question, under these circumstances, was, whether the Court would set aside the proceedings, or put the defendant to plead his discharge. He contended that the Court had authority to relieve the defendant on motion, or, at all events, to direct common bail to be entered. There are two sections in the Insolvent Act, 1 *Geo.* 4. c. 119, relating to actions against discharged insolvents; namely, the 26th and 28th. The former is confined to cases where the party is arrested or detained in pri-

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son; and, in such cases, a judge (not *the Court*) has the power to "release from custody such prisoner;" but that clause does not apply to this case, because here the defendant is not in custody, and the only relief which the judge has the peculiar power of granting, is to order his release from custody, supposing him to be confined. The 28th section relates to executions and actions against discharged insolvents, and that section gives the defendant a plea; and, if the plaintiff be nonsuited, discontinue, or verdict pass against him, or judgment on demurrer, the defendant is to have double costs. The question then is, whether this section makes it imperative on the defendant to plead; if it does not, the Court will set aside the proceedings on the bail bond, or at least allow common bail to be filed. It is material to observe, that the former Insolvent Debtors' Act, 54 *Geo.* 3. c. 28, contains two nearly similar sections to those in 1 *Geo.* 4. c. 119; one empowering any judge of the Court, or two justices, to release the prisoner; and the other giving him a plea and double costs. In *Wilson* v. *Kemp* (a) it was held, that an insolvent debtor, who has taken the benefit of that statute, is not liable to arrest upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act. Undoubtedly in that case the defendant was in prison at the time of the application, and there the *Court* interfered notwithstanding the clause in the statute similar to that in the present instance. The case of *Wilson* v. *Kemp* is, however, an authority to shew, that although the statute gives the defendant a plea, he is not precluded from applying to the Court. The Court, therefore, in the exercise of its general jurisdiction will relieve this defendant, instead of putting him to the expence of a plea, which must ultimately be found in his favour.

PER CURIAM.—We have no authority to grant this application. If the defendant were detained in custody, the Court would have authority, under the Insolvent Act, to

(a) 3 M. & S. 595.

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order his discharge; but there is no provision which relieves him from the necessity of pleading, if the plaintiff thinks proper to sue him for a debt contracted before his discharge. If we were to assume the authority contended for, we should be called upon, in every similar case, to try upon affidavit the truth of a plea which must be put on the record, and tried by the country.

Rule refused.



*Monday,*
*Nov. 24.*

## In the Matter of FARMER.

It seems that the prothonotary of the Court of Requests, *Whitechapel*, is not authorised in receiving of a plaintiff suitor, at one payment, *all* the fees necessary to bring his cause to issue, *before* the suit is at issue.

CHITTY, on a former day, obtained a rule, calling on the prothonotary of the Court of Requests, *Whitechapel*, to shew cause why he should not be removed from his office for alleged extortion, in taking more fees from one of the suitors of the Court named *Levy Alexander*, than by the scale of fees regulated by the act of parliament, under which the Court was constituted, he was authorised in taking. It was alleged amongst other grounds of complaint, that the prothonotary had taken all the fees, namely, for summoning the jury, entering the cause, and issuing subpœnas, before the cause was at issue. There was no allegation that the complainant had applied to the officer to have the supposed excess of fees returned before this application was made.

*Wilde* now shewed cause upon affidavits, which completely relieved the officer from all imputation, on the ground of fraud or extortion; and as to taking the fees before hand, it was sworn that that was the constant practice and course of business in the Court.

ABBOTT, C. J.—If this party had discovered that he had paid more fees than he ought, he should have applied to the officer, and explained the matter to him, and have desired the money to be refunded. Instead of that, he takes the harsh and severe step of calling upon us to remove him

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from his office, which in a fit and proper case the Court has authority to do under the act of parliament. The only ground of complaint which is not distinctly and clearly answered, is, with respect to the officer taking at once all the fees for summoning the jury, for entering the cause, and issuing the subpœnas. The answer to that is, that this is the constant practice and course of the Court. It rarely happens that a cause can be tried with sufficient celerity to justify taking all the fees at once, and though I do not think that this party has subjected himself to the severe penalty which the Court is called upon to inflict upon him, still I must say I do not approve of the practice of taking all the fees before hand. For this reason, I think that this rule ought to be discharged *without costs.*

HOLROYD (*a*) and BEST, Js. concurred.

Rule discharged, without Costs.

(*a*) *Bayley*, J. was absent.

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MORRIS *v.* JONES (*a*).

*Wednesday, Nov. 26.*

If the parties to a warrant of attorney agree that execution shall issue upon the judgment after a year and a day without reviving the judgment by *sci. fa.* there is nothing illegal in such a bargain, and execution may be taken out notwithstanding the stat. *Westm.* 2.

Copyhold lands cannot be extended under an elegit, but, if the inquisition comprehends both freehold and copyhold, it may be good as to the former, and bad as to the latter.

Where, under one elegit, a moiety of defendant's lands were taken to satisfy a judgment; and under a second elegit, the *whole* of the remainder of his lands were taken instead of a moiety of the moiety:—Held, that the second elegit was a mere nullity, and there was no occasion to apply to the Court to set it aside.

*J. EVANS*, on a former day, moved for a rule to shew cause why the two writs of elegit, and the inquisitions taken thereon, which had been sued out upon a judgment entered up on a warrant of attorney, given to secure an annuity granted by the defendant to the plaintiff, should not be set aside for irregularity. He submitted four grounds of objection, first, that the judgment was more than a year and

(*a*) Vide ante, p. 263.

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a day old, and no scire facias had been sued out to revive it. It was true that the warrant of attorney contained an agreement to waive this irregularity; but he submitted that as the plaintiff was by common law left to his action on the judgment, he could only have execution upon it by complying with the requisites of the stat. *Westm.* 2. (*a*), and the defendant's consent could not dispense with compliance with those requisites. This principle had been laid down respecting warrants of attorney granted by prisoners, *Hutson* v. *Hutson* (*b*), and applied by analogy to the present case. Second, the extent made upon the defendant's lands was excessive, being more than double in value the amount of the debt owing; and as the lands could not be extended at all, where there are goods to satisfy the debt (*c*), by parity of reasoning it would appear that no more of the lands should be extended than was fairly requisite; besides which the warrant of attorney contained a stipulation that only so much land as was necessary should be taken. [*Abbott*, C. J. That objection, if tenable, would affect the inquisitions only, not the writs of elegit.] Third, copyhold lands have been extended, which is clearly illegal; *Gery* v. *Smart* (*d*); 7 *Rep.* 49, and *Plowd.* 224; and that will render the extent void in toto, *Berry* v. *Wheeler* (*e*), Earl *Stamford* v. *Hobart* (*f*), *Com. Dig.* Execution, C. 14, and *Putten* v. *Purbeck* (*g*). [*Bayley*, J. That may be fatal to the extent in part, but will it render it void in toto?] It must have an effect co-extensive with the execution; the execution is entire, and therefore the extent is bad for the whole (*h*). [*Bayley*, J. That might be so if more than a moiety of the lands had been taken; but that is not alleged here. Suppose some freehold, and some copyhold lands taken, and the sheriff extends a moiety of each; the extent would be bad as respects the copyhold, but it would remain good as

(*a*) 13 E. 1. st. 1. c. 45.

(*b*) 7 T. R. 7. R. E. 4 *Geo.* 2.

(*c*) 2 Inst. 395. Com. Dig. Execution, C. 11.

(*d*) Dyer, 205, b.

(*e*) 1 Sid. 91.

(*f*) Id. 239.

(*g*) 2 Salk. 563.

(*h*) Co. Lit. 189 b.

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against the freehold.] Upon the authorities already referred to, it would appear that the extent in such a case could not be severed, and that being bad for a part, it would be bad for the whole. Fourth, under the second elegit, the whole of the defendant's lands left after the first elegit, were extended, which cannot be done; for upon a second writ only a moiety of that moiety which was not extended by the first can be taken. *Huyt* v. *Cogan*(a).

ABBOTT, C. J.—We think there is nothing in the first two objections. If the defendant thought proper to enter into a bargain that execution should issue upon the judgment, without a scire facias to revive it, he cannot afterwards be permitted to avoid the consequences, by setting up the illegality of the proceeding. A warrant of attorney, given by a prisoner, presents a very different consideration, because there the party may be supposed to act under duress. Second, as it does not appear that more than a moiety of the lands was taken under the first inquisition, that cannot be called excessive; a moiety is the proportion which the law directs to be taken, and if that eventually proves more than sufficient to pay the debt, the surplus may be paid over to the defendant. As to the other objections, take a rule nisi for setting aside the first inquisition with respect to the copyhold lands, and the second altogether.

*Tindal* now shewed cause. In answer to the first objection, which applies to the first inquisition, it is distinctly sworn, on the part of the defendant, that no copyhold lands have been taken, and the Court will not interfere in such a case to try a doubtful question of fact upon contradictory affidavits. With respect to the second inquisition, it must be admitted that the sheriff has acted erroneously in seizing the whole residue of the lands; but that forms no ground for the present application, because the return to the second elegit is altogether void, and may be treated as such by the

(a) Cro. Eliz. 482.

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defendant, without the interference of the Court. *Fenny* v. *Durrant* (a). Upon both points therefore the rule must be discharged.

*Brougham* and *J. Evans*, in support of the rule. Upon the latter point, at least, the Court will think this a proper case for their interference, in the summary way suggested by this motion. The defendant has been injured by the operation of the second inquisition, although it may now be abandoned; because in the mean time the tenants have received notice to pay their rents to the plaintiff, and the defendant can have no mode of recovering the payments so made, except by an action. The inquisition therefore being clearly bad, and its operation being to prejudice the defendant, the Court will protect his interests by setting it aside.

ABBOTT, C. J.—We are of opinion that this rule must be discharged. The first part of it relates to copyhold property, and the ground upon which we granted the rule as to that was, a dictinct allegation of fact, that the inquisition included copyhold land. It is now, however, suggested on affidavit, that no copyhold has been extended. That is a question which we cannot try upon affidavit. Indeed it is unnecessary we should do so, for if copyhold has been taken under the first inquisition, that inquisition, as far as it relates to that part of the property, must be abandoned as invalid. Then, as to the second objection, the case cited shews that this application was perfectly unnecessary, inasmuch as the objection is fatal in point of law to the second inquisition. On the face of it, it is void in itself, and does not require the aid of this Court to set it aside. There is no occasion to apply to us to set aside a nullity. Let the rule, however, be discharged without costs, the plaintiff undertaking to pay over to the defendant the sum extended under the second elegit.

Rule discharged, without Costs.

(a) 1 B. & A. 40.

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## The KING v. ROGERS.

*Wednesday, Nov. 26.*

Where in the return to a writ of habeas corpus, two causes were assigned for a prisoner's detention, first, a conviction for smuggling, and second, desertion from the navy:— Held, that the latter cause could not be impeached on affidavit for the purpose of shewing either that the prisoner had never been a seaman in his majesty's navy, or that supposing him in fact a seaman, he had been illegally impressed in the first instance.

Quære, whether smuggling *Bandana* silk handkerchiefs is an offence within the meaning of 45 *Geo.* 3. c. 12. and 3 *Geo.* 4. c. 110. subjecting the party to be sent to serve in the navy.

THIS defendant having been convicted on the 24 *Geo.* 3. c. 47. s. 1, of smuggling, was adjudged by two Justices to serve in the navy pursuant to 3 *Geo.* 4. c. 110. and sent on board his majesty's ship *Queen Charlotte*, for that purpose. In the return to a habeas corpus, which had issued to bring the defendant up for the purpose of being discharged, the causes assigned for his detention were, first, the conviction above-mentioned, and second, that having been a deserter from his majesty's ship *Beaver* in *October*, 1821, he was detained for the purpose of being dealt with according to law for such desertion.

*Brougham* and *Platt* for the defendant, now proposed to impeach the validity of the return as to the second cause of detention, by shewing upon affidavits, first, that the defendant never had been a seaman in his majesty's navy, nor liable to serve in that capacity; and second, (without denying the fact, that he had been a seaman on board his majesty's ship *Beaver*), that he was illegally impressed in the first instance, and therefore might innocently leave the service (*a*).

The COURT, however, said they could not try the validity of the return upon affidavits. They were bound by the return. If it was false, the defendant's remedy was by action. The circumstance of the defendant having been illegally impressed in the first instance, might be set up as matter of defence, when he should be put upon his trial for desertion; but that question could not be tried in this place.

*Brougham* and *Platt* then objected, that inasmuch as the defendant was convicted of smuggling a certain number of pieces of *Bandana silk handkerchiefs*, he could not be detained

(*a*) Vide *Gardener's* case, Cro. Eliz. 821.

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for that cause, inasmuch as *silk* was not mentioned among the prohibited articles in 45 *Geo.* 3. c. 12. and 3 *Geo.* 4. c. 110, for the smuggling of which, a party was liable to be sent on board the navy. The only articles mentioned in those statutes were spirits, tea, and tobacco. Silk was not mentioned in either, and therefore the smuggling of silk would not support the conviction.

Abbott, C. J.—We need not enter into that objection now, because it is clear that the return is good upon the point already argued, and therefore we are bound to remand the prisoner. The only question before us is, whether he is entitled to his discharge. If either of the grounds upon which he has been detained is good, he is not so entitled, and we are all of opinion that the charge of desertion is a good ground of detention, and consequently that we have no power to order his discharge. We are therefore relieved from the necessity of giving any decision upon the other point. The prisoner must be remanded, but it may be made part of the rule, that he is remanded upon one ground only, namely, his being apprehended upon the charge of desertion from his majesty's navy; upon the other objection we express no opinion.

The prisoner was remanded.

*Copley*, S. G. and *Jervis* were to have argued contrà.

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## Rhodes *v.* Haigh and Another.

*Thursday, Nov. 27.*

Where a verdict was taken by consent, in an action for diverting a water-course, subject to the award of an arbitrator, to whom, by order of Nisi Prius, all matters in difference were referred, with liberty to him to regulate the future enjoyment of the water, according to the respective rights of the parties, and one of the parties died before the award was made:—Held, that the arbitrator's authority was thereby revoked, and the Court set aside an award made subsequently.

*Littledale*, on a former day, obtained a rule nisi for setting aside an award in this case, on the ground that

the plaintiff had died before the award was made. It was an action to try the right to a water-course, and the mode of using a stream of water. At the *Summer* Assizes for *Yorkshire*, in 1822, a verdict was taken for the plaintiff, by consent, damages 500*l.* and 40*s.* costs, subject to the award of an arbitrator, to whom, by an order of Nisi Prius, all matters in difference were referred, with power to enter a nonsuit, or a verdict for the defendant, and to regulate the future enjoyment of the water, according to the respective rights of the parties. On the 15th *December*, 1822, the plaintiff died, and the arbitrator did not make his award until the 5th *February*, 1823, and for this reason the rule sought to set the award aside, it being contended, that the death of the plaintiff before the award was made, operated as a revocation of the submission. A cross rule had, been obtained by *F. Pollock*, to enter the judgment nunc pro tunc, and both rules now came on together.

*F. Pollock* shewed cause against the rule for setting aside the award, and was heard in support of the rule for entering the judgment. The death of one of the parties to a cause which is referred by order of Nisi Prius, does not revoke the authority of the arbitrator, though the death takes place before the award is made. The time when the award is made, must have relation back to the date of the order of Nisi Prius, and therefore the award cannot be affected by the death of either of the parties to the submission. Here a verdict is taken at Nisi Prius for a sum certain, subject to the award of an arbitrator. Whenever the arbitrator makes his award, if it be within the time limited by the order of reference, it is to be considered as the finding of the Jury, or the determination of the Judge, as the case might have been at Nisi Prius. But for this application to set aside the award, the party in whose favour it was made, would have been entitled to enter up judgment as a matter of course, without applying to the Court for leave to do so. By the stat. 17 *Car.* 2. c. 8, if either of

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the parties to a suit dies between verdict and judgment, the judgment may be entered up within two terms after the verdict. In the same way the Court will give effect to an award, notwithstanding the death of either of the parties to the reference, upon the principle that the award of the arbitrator is in effect the same as the verdict of a Jury, and is substituted for it. The very object of entering a verdict for the plaintiff at Nisi Prius, is to guard against the consequences which have happened in this case. [*Bayley*, J. In *Easter*, 1816, there was a case of *Bower* v. *Taylor* (*a*), in which this principle was decided, namely, that where all matters in difference are referred to arbitration, by order of Nisi Prius, and the submission is confined to what the verdict and judgment will embrace, the death of either of the parties will be no revocation; but if any thing is submitted which the verdict and judgment will not embrace, then the death of either of the parties will be a revocation of the whole authority of the arbitrator; for if the arbitrator cannot proceed upon the whole matters in difference, he cannot proceed upon any.] In that very case the Court held,

If the verdict and judgment will embrace matters in difference, submitted to an arbitrator under an order of Nisi Prius, the death of either of the parties before award, will not revoke the submission; but *aliter* if the verdict and judgment do not embrace all matters in difference.

(*a*) This case is not reported, but the learned Judge stated the case from his own manuscript notes as follows:—There were verdicts taken in a replevin cause, between *Bower* and *Taylor* and others, and in an action of assumpsit between *Bower* and *Taylor* only, subject to a reference, the costs of the causes to abide the event, and those of the award to be in the arbitrator's discretion. *Taylor* died before the award was made. He was the defendant in the action of assumpsit, and one of the defendants in the replevin cause. The arbitrator proceeded in the reference, and ordered the verdicts to be entered for the defendants in both causes, and the plaintiff to pay the costs of the reference. A rule nisi to set aside the award having been obtained, it was urged, that the plaintiff might have wished to examine *Taylor*, and therefore his death before award, operated as a revocation.

ABBOTT, J. observed, that upon affidavits that he so intended, it might have furnished a special ground for vacating the award, but the master having stated that the costs of the reference would be included in the judgment, the Court held, that the death did not prevent the arbitrator's proceeding.

HOLROYD, J. thought no submission by order of Nisi Prius revocable.

Rule discharged.

that the death of one of the parties is no revocation, provided the submission embraces every thing that the verdict and judgment would cover. Now here, all the matters in difference may relate entirely to the subject of this action; and if that be so, then the death of the plaintiff is no revocation. But assuming that there are other matters in difference between the parties dehors the immediate cause which was at issue, still the order of Nisi Prius having been made a rule of Court, the Court cannot take notice of the death of either party. At all events the award will be good so far as it determines the original cause, thought it may not settle other matters in difference. [*Bayley*, J. The case to which I have already referred, decides otherwise, if there are matters in difference which the judgment and verdict will not embrace.] Then as to the rule for entering the judgment nunc pro tunc, that raises a question of practice, which has not been determined under the stat. 17 *Car.* 2. c. 8. Here the judgment would have been entered in *Hilary* Term, 1823, if the rule for setting aside the award had not been moved. The rule for judgment was given on the 7th *February*, and would have expired on the last day of that Term; and according to the practice of the Court, as will be insisted on the other side, the judgment could not be entered after the Term has expired. The words of the statute are, "that in all actions personal, real, or mixt, the death of either party, between the verdict and the judgment, shall not hereafter be alleged for error; so as such judgment be entered within two Terms after such verdict." Now the rule for judgment having been served within *Hilary* Term, it is competent for the defendant now to enter judgment as of that Term.

*Littledale* and *E. Alderson*, contrà, were stopped by the Court.

ABBOTT, C. J.—As to the rule for entering the judgment, I am of opinion that it must fall to the ground. The

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words of the statute "so as such judgment be entered *within two Terms* after such verdict," are very precise, and we cannot enlarge them by importing into the statute the words "*of* the Term." I do not know what the practice is with regard to entering judgments, but I believe the judgment is considered as entered of the day when the rule for judgment is obtained. The entering of the judgment must be the actual signing by the proper officer, *within* the time limited by the rule; and for this reason, that it will be binding on the lands of the deceased party; and therefore it ought to be entered immediately. With respect to the rule for setting aside the award, I think this case comes within the principle of *Bower* v. *Taylor*, referred to by my Brother *Bayley*. Here all matters in difference are referred, and the arbitrator has authority delegated to him by the order of Nisi Prius, to regulate in what manner the stream shall be enjoyed in future. The verdict and judgment would only embrace the cause at issue, and therefore according to *Bower* v. *Taylor*, the death of either of the parties before award, would revoke the submission altogether. Since the decision of that case, however, *Cooper* v. *Johnson* (*a*) was determined, and there, though the *cause only* was referred, it was held, that the authority of an arbitrator is determined by the death of either party before the award. The case of *Potts* v. *Ward* (*b*), is an authority to the same effect. I am therefore of opinion that the rule for setting aside the award, must be made absolute. The other rule must fall to the ground.

BAYLEY, HOLROYD, and BEST, Js. concurred.

Rule absolute.

(*a*) 2 B. & A. 394.

(*b*) 1 Marsh. 366.

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## HIGGINS *v.* SARGENT and Others.

*Friday, Nov. 28.*

Interest is not recoverable in covenant upon a policy of insurance payable six months after due proof of the death of *A.* although the money insured is not paid at the time stipulated.

THIS was an action of covenant on a policy of insurance, dated 10th *March*, 1819, whereby the defendants covenanted to pay to the plaintiffs the sum of 4000*l.* at the expiration of six months after due proof of the death of a person named *Burton*. At the trial before *Bayley*, J. at the last Assizes for *Yorkshire*, the case turned upon the question, whether, at the time the policy was effected, *Burton*'s was an insurable life. The Jury, under the learned Judge's direction, having found their verdict for the plaintiff, his counsel submitted, for the first time, that the plaintiff was entitled to interest upon the principal sum insured, calculating the amount from the time the money was payable, until the time of signing judgment. The learned Judge was of opinion, that interest was not recoverable upon this instrument, but saved the question for the opinion of the Court, whether he ought to have directed the Jury to find interest.

*Scarlett*, on a former day, obtained a rule nisi to increase the damages on affidavits, stating that *Burton* had died in *April*, 1821, and that due proof had been given to the defendants of his death; that the sum insured became due on 6th *November*, 1822, and that the interest upon that sum, until the first day of this Term, would amount to 200*l.*, by the addition of which sum, it was proposed to increase the damages.

*J. Williams*, *F. Pollock*, and *Holt* now shewed cause. Assuming that interest was recoverable in this case, as damages for the detention of the debt, it is not competent for this Court, after verdict, to increase the damages. Nothing was said about interest in the course of the discussion of the cause; the attention of the Jury was not called to it, and

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the defendants' counsel had no opportunity of addressing them upon so important a topic. If it had been intended by the plaintiff to make interest a part of his claim, the Jury should have had an opportunity of exercising their judgment upon the subject. It was their particular province to decide as a question of damages, under the direction of the learned Judge, whether the plaintiff was entitled to interest. That question was never submitted to them, and therefore this application comes too late, inasmuch as the Court has no authority over the matter in question. In *Du Belloix* v. *Lord Waterpark* (*a*), which was an action upon a promissory note, sued upon thirty years after it was made, and the Jury having refused to give interest, it was held, that after verdict, this Court could not increase the amount of the verdict by adding the interest; and *Abbott*, C. J. is there reported to have said, "I am clearly of opinion, upon principle, and upon decided authorities, that the question in this case, whether the plaintiff was entitled to interest upon his principal debt, was peculiarly within the province of the Jury to decide. Interest upon such securities is no part of the debt, and where it is given, it is upon the ground of the injury which the party has sustained by the detention of his debt after it may be lawfully demanded, and Juries give it as damages. The Jury in this case desired to know whether they were bound to give the plaintiff interest upon the note, and I told them, they might do so if they thought proper, but that they were not bound to give him any more than the principal sum mentioned in the note, and they did not think it right to give him interest" (*b*). This is a decisive authority to shew, that after verdict, this Court cannot increase the damages by adding interest. But independently of this objection, it is perfectly clear, that interest is not recoverable upon money secured by a policy of insurance. No instance can be found, in which it has been given in such a case. The circumstance of a sum becoming payable at a specific time, does

(*a*) Ante, vol. i. 16.

(*b*) Vide *Lee* v. *Lingard*, 1 East, 400.

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not in all cases entitle the party to interest. The case of *Gordon* v. *Swan* (*a*), was decided upon that principle. There a certain quantity of copper was sold under a contract in writing, payable at six months, and the money not having been paid at the time stipulated, and the plaintiff having claimed interest for the detention of the money, Lord *Ellenborough*, C. J. is reported to have said, "I think the contract only meant, that the vendee at all events shall not be called upon for payment till the time given. The giving of interest, should, I think, be confined to bills and such like instruments, and to agreements reserving interest." In this case, no interest is reserved either expressly or impliedly, and it is difficult to see upon what principle it can be said that from the period when notice was given of the death of *Burton*, interest is recoverable. But in fact this case is distinguishable from those cases where a day is specifically named for the payment of a sum of money. Here no day is named. The stipulation is to pay the money at the expiration of six months after due proof is given of the death of *Burton*. The time of payment, therefore, depends upon the species of proof given of the death of the party, which renders the day wholly uncertain.

*Scarlett* and *D. F. Jones*, in support of the rule. As to the objection that the interest ought to have been found by the Jury as damages, the learned Judge said at the trial, that if in point of law the plaintiff was entitled to interest, an application might be made to the Court to increase the damages. [*Bayley*, J. I said, that if I ought to have directed the Jury to give interest, then the plaintiff was at liberty to move the Court upon that question.] Now it is clear, that interest was recoverable in this action. This is a specialty debt, the money being absolutely payable at a time certain, and therefore it would carry interest in point of law. It is upon this principle, that interest is payable

(*a*) 12 East, 419.

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upon bills of exchange and promissory notes, though they be not specialties, and à fortiori interest runs upon a clear specialty debt. Interest is not due for rent in arrear, but the principle upon which it is not allowed is, because the landlord may recover his rent by distress and sale of the tenant's effects. [*Bayley*, J. But there may be no goods on the premises, and still interest would not be allowed if the landlord resorted to his action for use and occupation, though the rent was payable on a specific day.] If a party purchases goods, and agrees to pay for them at the end of a certain time, by a bill having two months to run, and the bill is not given at the time agreed upon, interest runs from the time of the expiration of the credit. [*Holroyd*, J. The ground on which interest is recoverable in the case where goods are to be paid for by a bill of exchange, and it is not given at the time agreed, is, that the vendee shall not be placed in a better situation than if he had given the bill of exchange.] The same principle applies to this case. Here is a sum of money payable on a specialty, at a certain time. The money is not paid at the time stipulated, and there seems no good reason why interest should not run from the time the principal money became due. In *Blaney* v. *Hendricks* (*a*), it was held that interest is due on all liquidated sums from the time when the principal becomes due and payable. [*Abbott*, C. J. That case is no longer law.] But this is a specialty; the money is due and payable at a particular time, and therefore at all events interest runs in this case.

ABBOTT, C. J.—The general practice of late years has been to allow interest only upon mercantile securities, such as promissory notes, and bills of exchange, which carry interest by the custom of merchants, or in those instances where interest is secured by the express undertaking of the parties, or where such undertaking is implied from the usage of trade, or other circumstances. That is the general rule;

(*a*) 2 Sir W. Bl. 761.

and I apprehend that if we were to break in upon that general rule in this particular instance, it would let in the discussion of questions of this nature in a great variety of cases. Now, the way in which this case comes before the Court is this:—At the trial no point respecting interest was made before the learned Judge had summed up the case for the Jury, upon the question of fact, left for their consideration. After the Jury had considered their verdict, and found in favour of the plaintiff, then, for the first time, it was contended that the plaintiff was entitled to interest upon the principal sum secured by the policy from the time when it had become due and payable. That point was reserved by my learned Brother in this manner; "If I ought to direct the Jury to find interest, as damages, it will be considered as if I had so done; but unless I ought so to direct them, I shall not now say any thing upon that point." It is impossible to say, that consistently with decided cases, the Judge ought to have directed the Jury to give interest upon this policy. The utmost he could have done would have been to leave the matter to their discretion. Whether they would have given interest or not we cannot say. If they had not, and the plaintiff was by law entitled to it, that could only have been ground for a new trial, and not for a motion to increase the damages. I am, however, of opinion, that they could not have gone beyond the principal sum, because they could not do so without breaking in upon that general practice which has been so long established. This is not one of those mercantile instruments which carry interest by law, and inasmuch as there was no promise, express or implied, on the part of the defendant, to pay interest, I cannot hold that the Jury ought to have been told they were bound to give interest.

BAYLEY, J.—In early times it was thought that money lent would carry interest, and generally speaking, when a man borrows money, it is very natural to consider that he should have to pay some interest for the use of it; but in

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*Calton* v. *Bragg* (a), that notion was corrected, and it was there decided by this Court that money lent generally, without a contract expressed or implied, from the usage of trade or from special circumstances, would not carry interest. If, therefore, money lent, which is to be repaid upon demand, or at a given time, will not carry interest, I can see nothing which obliges the Jury to find interest due upon money payable within a certain time after due proof of a given event. It is said, that this is a specialty debt, but I cannot see that that makes any difference, where there is nothing express or implied, from which we can collect that it was the intention of the parties that the principal money was to bear interest from the time it became due. Had such been their intention they ought to have expressed it in the deed, but not having done so, we cannot imply that such was their intention. I thought at the trial, that in the absence of any contract, express or implied, I ought not to direct the Jury to give interest, which is generally given on the principle of punishment, for the non-payment of a debt by a time stipulated, and here certainly no fair grounds for giving interest on that principle, existed.

HOLROYD, J.—I am of opinion that the Judge would not have been warranted in directing the Jury to give interest on the principal sum in this case. The modern doctrine is quite decisive of this question; but according to the old authorities themselves, it would have been very difficult, in my opinion, to support the verdict of the Jury for interest, even if the question had been left to their consideration, and they had given interest upon the money. It is, however, sufficient, in order to dispose of this motion, to say, that according to modern decisions the Judge was not bound to direct the Jury to give interest. Looking into these authorities, it will be found to have been clearly established, that unless interest is payable by the usage of trade, or by the contract of the parties, either express or implied, or other cir-

(a) 15 East, 223.

cumstances, it is not payable by the common law, and therefore the Jury would not be warranted in giving it, except in the cases I allude to. It has been thought extremely desirable to lay down some general rule, which should remove all uncertainty in the exercise of the discretion both of Judges and Juror's on such questions. In the nisi prius case of *De Havilland* v. *Bowerbank* (a), Lord *Ellenborough* said, "I want very much to lay down a certain rule respecting the payment of interest. I recollect some extremely capricious determinations on this subject; and on all occasions as little as possible should be left in the discretion of a Judge. It appears to me that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as in bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where it can be proved that the money has been used, and interest has been actually made. Without some restrictions of this kind, book debts might be allowed to bear interest; and in every action for work and labour, or for goods sold, there must be a calculation of what is due for interest, above the principal debt. Mr. Justice *Buller*, in one instance, allowed interest on policies of insurance; but I believe he was there thought to have done wrong. My great object is to have a fixed rule, and to exclude discretion." It was expressly decided in *Gordon* v. *Swan* (b), that although the money is to be paid at a certain day, yet the non-payment of it on that day does not give a right to interest from that period, inasmuch as there must be some contract either express or implied, or some usage of trade to give it. But I am of opinion that according to the principles of the common law, interest is not payable upon a sum certain, payable at a given day. By the common law the action of debt was the only mode of recovering a sum certain, except where there was a breach of covenant. When the party sued in an action of debt, it was in the form of a writ out of Chancery, by which the defendant was summoned, and com-

(a) 1 Campb. N. P. 50. (b) 12 East, 419.

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manded that he render to the plaintiff the debt, or shew cause why he had not done so. If the defendant paid the debt, the plaintiff could not go on with his suit, because payment of the debt would be an answer to the action. Suppose this had been an action of debt, the payment of the principal money would have been a valid defence, and would prevent the recovery of interest, because the interest itself is no part of the debt, but is merely claimed as damages for the detention of the debt. In cases, however, where the interest is due on a contract, express or implied, it may be sued for as part of the debt, and payment of the principal sum would be no answer to the action. But in this case there is no contract, either express or implied, to pay interest, and consequently it could form no part of the debt, and if recoverable at all, must have been in the shape of damages for the detention of the principal money. All the cases referred to have gone upon this principle, and therefore the Judge could not have been warranted in directing the Jury to give interest in this case. If the plaintiff had pursued his remedy in an action of debt, he could not have recovered interest upon this money, and I see no reason why in an action of covenant he is to be placed in a better situation. It is not requisite to decide whether, if the Jury had given interest, their verdict could be sustained; the question is, whether the Judge was bound to direct them to give interest; and I think that the cases referred to are decisive to shew that he would not have been warranted in so doing (a).

Rule discharged.

(a) *Best*, J., was absent.

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## SMITH v. JONES.

*Friday, Nov. 28.*

A plea to assumpsit on a promissory note, "that defendant did not undertake," omitting the words "or promise," "in manner and form, &c." with a conclusion to the country, is not so unintelligible a plea as to entitle the plaintiff to sign judgment for want of a plea.

ASSUMPSIT on a promissory note, with the money counts. Plea, that defendant did not undertake (omitting the words "or promise,") in manner and form, &c. and of this he puts himself on the country; and the plaintiff having treated this plea as a nullity, and signed judgment as for want of a plea,

The COURT, on motion to set aside the judgment with costs, for irregularity, ruled that the plea was sufficiently intelligible to make it improper for the plaintiff to sign judgment, but on account of the carelessness of the defendant in pleading such a plea, they made the

Rule absolute, without Costs.

*Chitty*, for the plaintiff; *Platt*, for the defendant.



## The KING v. THOMAS.

*Friday, Nov. 28.*

*Semble*, that the Court will on motion, quash an indictment for perjury for want of an addition to defendant's name, if the exception be properly taken; but they refused to quash such an indictment where the defendant produced no affidavit giving his proper addition.

INDICTMENT for perjury, found at Sessions, and removed into this Court, at the instance of the prosecutor. *C. F. Williams*, on a former day, obtained a rule nisi to quash the indictment for want of an addition to the defendant's name.

*Wilde* now shewed cause. The Court will not depart from the rule laid down by *Holt*, C. J., in the case of *Rex*

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v. *Belton* (*a*), where he said, "We never quash indictments for forgery, *perjury*, subornation, or any crime concerning the highways;" and where it is also said, the Court, on another occasion, declared they would not quash an indictment, "for any heinous offence," but would leave the defendant to plead, demur, or move in arrest of judgment. The defendant is attempting, by this course, to obtain an advantage to which he would not be entitled in any subsequent stage of the proceedings, for such a defect as this would scarcely be held fatal on demurrer, and would certainly be cured after verdict (*b*). Here the defendant has not given his true addition, and had he pleaded in abatement, he would have been bound to give his addition, and verify the truth of his plea on affidavit. He must, to give the prosecutor a better writ. The defendant is in this dilemma; either he has appeared to the indictment, or he has not: if he has appeared, he has waived the irregularity (*c*); if he has neglected to appear, it seems that he is not in a condition to make this application (*d*).

C. *F. Williams*, contrà, relied upon *Rex* v. *Wheatley* (*e*), and the dictum there laid down by Lord *Mansfield*, that "the Court may use a discretion whether it be right to quash upon motion, or put the defendant to demur;" contending that this was a proper case for the summary interference of the Court. He admitted, however, that he could not find any case in which an indictment for perjury had been quashed under circumstances similar to the present.

ABBOTT, C. J.—Referring to the language of the statute of Additions (*f*), I think there can be no doubt that if this exception had been taken in proper form, we should be bound to quash the indictment. The only question is as to the form in which advantage is to be taken of the exception.

(*a*) 1 Salk. 372. See 1 Sid. 140.

(*b*) Vide 3 T. R. 98. 5 Id. 162. 8 East, 41.

(*c*) 1 Chitty's C. L. 202, and the cases there cited.

(*d*) 1 Salk. 380.

(*e*) 2 Burr. 1125.

(*f*) 1 Hen. 5. c. 5.

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Here the defendant merely comes in on motion to quash the indictment for want of an addition; but he now gives himself no addition at all, whereby the prosecutor may be enabled afterwards to proceed against him. I should be disposed, in a proper case, to follow the words of the statute, which are, that "indictments in which the addition be omitted, shall be void, frustrate, and holden for none, and shall be abated by the exception of the party;" but the party must come and make his exception in such a manner as that the Court may know who he really is. That is not done here; there is no affidavit giving his addition, so that the prosecutor may correct his error, and proceed against him in a proper manner. If we were to quash this indictment, it would be out of the prosecutor's power to proceed against the defendant until he ascertained his addition.

BAYLEY and HOLROYD, Js, concurred (a).

Rule discharged.

(a) *Best*, J., was absent.

END OF MICHAELMAS TERM.

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## BULKELEY and Others *v.* BUTLER (in Error) (*a*).

THIS was a writ of error, upon a bill of exceptions, from the Common Pleas, in an action of assumpsit by the indorsee against the acceptors of a foreign bill of exchange for 1800*l.* dated *August* 6th, 1816, drawn by *John Bulkeley* and *Son* upon the defendants, to the order of *Edmund Shanahan*, accepted by the defendants, and purporting to be indorsed by *Edmund Shanahan* to the plaintiff, for value. Plea, the General Issue. At the trial before *Dallas*, C. J. at the *London* adjourned Sittings after *Trinity* Term, 1821, the defence set up was, that the indorsement of the payee had been forged; and in order to prove the indorsement, a clerk of the plaintiff, who was a merchant at *Cadiz*, was called, who stated, that "on 10th *August*, 1816, a person, calling himself *Edmund Shanahan*, came to the house of the plaintiff, at *Cadiz*, and produced a letter of recommendation, which was received and read by the plaintiff, who in consequence received and entertained the person." The witness produced and identified the letter, which was as follows:—"*Lisbon*, 29th *July*, 1816. *A. Butler*, Esq. *Cadiz*. Sir.—This will be handed to you by *Edmund Shanahan*, Esq. who, in his travels through *Spain* on commercial pursuits, will pass some days at your city. This gentleman has been introduced to us by a very particular friend, and we take the liberty to recommend him to you, and to request that you will give him every necessary information to guide his operations, and we will be thankful for any attention and civilities you may be pleased to shew

Where a foreign bill of exchange was drawn by *A.* upon and accepted by *B.* payable to the order of *C.* and a person representing himself to be *C.*, indorsed the bill to *D.* for value, and the indorsement, as was alleged, turned out to be forged:—Held, in error, that in an action by the indorsee against the acceptor, it was unnecessary to give positive proof of the identity of the indorser, as the person to whom the bill was really payable, primâ facie evidence being sufficient. *Semble*, that if such evidence is objected to as insufficient, the proper course for taking advantage of the objection, is on demurrer, and not by bill of exceptions.

(*a*) A warrant under the Royal Sign Manual having issued ten days before the end of *Michaelmas* Term, pursuant to 3 *Geo.* 4. c. 102, the puisne judges of this Court sat in a room adjoining the *Guildhall*, at *Westminster*, from *Tuesday*, the 13th, to *Thursday*, the 22d *January*, 1824, both days inclusive; when the following cases were decided:—It has been thought expedient to insert these cases, as of *Michaelmas* Term, with a view to the convenient size of the third volume of these reports, which is now completed.

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him during his residence at your place. We will be very happy if you afford us opportunities of reciprocating to any of your friends coming this way, and are, &c. *Mac Donnell, Brothers*, and *Co.*" This letter having been read in evidence, the witness went on to state, that "he knew *Mac Donnell, Brothers*, and *Co.* and that the letter was their hand-writing; that he had not previously seen or known *Edmund Shanahan*; that the bill on which the action was brought was produced by the person calling himself *Edmund Shanahan*, at *Cadiz*; that the said person remained at *Cadiz* from the 10th to the 19th *August*, and dined at the house of the plaintiff every day; that on the 19th *August* he produced the bill in question, and said that he had come from *Ireland*, with goods, which he had sold in *Lisbon*, and the produce of them he had brought in bills, which he requested the plaintiff to forward for acceptance, and that he should probably require some of the money that day; that on the same day the said person left the bill in question (among others) with the plaintiff, unindorsed, and went away, but returned the next day, and asked the plaintiff to negotiate the bill on his own account, and that he should require the money at *Gibraltar*; that the plaintiff assented to that request, and the said person (in the witnesses's presence) put his signature to an indorsement which had been previously written on the bill by the plaintiff; that the bill was then left with the plaintiff, who, in consequence, advanced money exceeding its amount, and gave a letter of credit on *Gibraltar*, to the said person." On his cross examination, the witness said, that "when the said person delivered the bill in question to the plaintiff, he also delivered another for 640*l.* purporting to be drawn by *Mac Donnell, Brothers* and *Co.* and which was subscribed by one of the partners in that firm; and another for 1500*l.*; that the bill for 640*l.* had been refused payment, on the ground of forgery; and that when the plaintiff first saw the letter of introduction and the bill in question, he (the plaintiff) well knew that the hand-writing of *John Bulkeley* and

*Son,* subscribed to the bill, was the hand-writing of one of the partners in that firm, and that the letter was written and subscribed by one of the partners in the firm of *Mac Donnell, Brothers,* and *Co.*" It was objected on the part of the defendants, that there was no evidence to go to the Jury of the identity of the person calling himself *Edmund Shanahan,* with *Edmund Shanahan,* the payee of the bill. The learned Judge over-ruled the objection, and told the Jury, that "although in law there should be some proof of the identity of the person making the indorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one; that therefore the question for them to consider was, whether there was or was not sufficient evidence of identity in this case to satisfy them (there being none to the contrary, nor any evidence of there being any other person of the name of *Edmund Shanahan* connected with the bill); that the circumstance of the person calling himself *Edmund Shanahan* having produced to the plaintiff and the witness the genuine letter of introduction and the bills of exchange actually subscribed by *John Bulkeley* and *Son,* and by *Mac Donnell, Brothers,* and *Co.,* whose firms and hands-writing were known at the time to the plaintiff, was material to prove the identity; and that in his opinion the evidence adduced was reasonable evidence to be left to them, to consider whether the indorsement was the indorsement of the person to whom the bill was made payable. The Jury having expressed themselves satisfied of the identity, a bill of exceptions to the learned Judge's charge was tendered on the part of the defendants, and the plaintiffs had a verdict. The error was assigned upon the learned Judge's charge to the Jury. Joinder in error.

*Wilde,* for the plaintiffs in error, was preparing to argue, when

BAYLEY, J. interposed.—Is there not a preliminary objection here, independent of the merits? It seems to me

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that the defendants below ought to have demurred to the evidence, instead of tendering a bill of exceptions. By taking the latter course, they obtained an advantage to which they were not entitled, namely, the chance of a verdict in their favor. When the whole of the plaintiffs' evidence had been heard, the defendants insisted that there was no evidence to go the Jury, and in such circumstances their regular course was to demur. If they had pleaded that the bill was not in fact indorsed by *Shanahan*, and the same evidence only had been given, they must have contended that the issue had not been proved; and then, if the case had been left to the Jury, have demurred. I think they should have done the same in the present instance, and then they would have brought the question before the Court of C. P. on demurrer, instead of bringing it before us by a bill of exceptions.

*Wilde.* When evidence is offered by the plaintiff, to which the Judge attributes an effect which it is for the interest of the defendant to deny, it is surely open to him to except to the Judge's direction in that respect. [*Bayley*, J. Then upon the merits. Why did not the defendants put the question out of all doubt, by calling either the drawer of the bill, or the writer of the letter of introduction, and so proving who *Shanahan* was?] Neither of them might have been able to give the evidence required. Any man may go upon the Royal Exchange, and purchase a bill of a perfect stranger, and then how is the identity of the holder with the indorser to be afterwards proved? If the letter of introduction had been written in *England*, it is quite clear that it could not have been received in evidence. [*Bayley*, J. But it would as clearly have been admissible if it had been shewn in *Shanahan's* possession in *London*. Even without the letter, was there not sufficient proof of his identity? He assumes to act as *Edmund Shanahan*; he keeps up that character openly for ten days; and he is in possession of two genuine bills, and a general letter of recommendation.]

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The effect of such a doctrine would be by degrees to dispense with all proof of identity in such cases. [*Best*, J. Surely the possession of the bill is primâ facie evidence of an ownership of it. *Holroyd*, J. And it has been decided in *Mead* v. *Young* (*a*), that the onus of proving the non-identity of the indorser lies on the defendant.] The common proof required in ordinary cases of actions by indorsees against acceptors is not sufficient in this case. In ordinary cases, proof of the hand-writing of the indorser is proof of his identity as indorser; here, further evidence was necessary, and that which was resorted to was not admissible in point of law. As to the possession of the bill, it was evidence of the simple fact of possession, and of nothing more; it did not support even the presumption of a right of property in it. Suppose, in an indictment for felony, it was necessary to shew that the person negotiating the bill was named *Edmund Shanahan*; his possession of a bill made payable to *Edmund Shanahan* would not be evidence of that fact. [*Best*, J. It would certainly be primâ facie evidence of it, and would operate as such until rebutted.] Then the letter, even if it was admissible, does not carry the plaintiffs' case any further. *Mac Donnell*'s written representation that *Shanahan* had been introduced to him, is no evidence that the bearer of that writing was *Shanahan*. *Mac Donnell* ought to have been called as a witness, in order that he might have been subjected to a cross-examination as to his knowledge of the facts which he had taken upon himself to state in his letter. Besides, the letter was very general in its nature; it was a mere introduction, not a letter of credit. The best evidence, therefore, was not produced; and on that ground the letter should have been rejected. [*Bayley*, J. It is by no means necessary in all cases to produce the best possible evidence to the affirmative of a question. For instance, a person in the habit of corresponding with another, is competent to prove that other's

(*a*) 4 T. R. 28.

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hand-writing, although there may be persons in existence who have seen him write, or even who have seen him sign the particular instrument in question. *Holroyd*, J. In indictments for forging bank notes, it has never been held requisite to call the clerk who is supposed to have signed the forged note, in order to negative that fact.] That rule must be admitted; but it hardly applies to the present case. A person who has been long in the habit of corresponding with another, may be much better acquainted with his hand-writing, than one who merely sees him write on some one particular occasion. The argument, therefore, remains unshaken, that *Mac Donnell's* written representation, that *Shanahan* had been introduced to him, was not the best evidence of that fact, and consequently ought not to have been received. [*Bayley*, J. Admitting that argument, it will only exclude a portion of the letter; the former part, which introduced *Shanahan* to the plaintiff, was still admissible.] *Mac Donnell's* assertion that he knew *Shanahan*, was in fact no proof of knowledge at all. The letter must be taken altogether; and if one part of it fails, the whole must be rejected; for it is an established rule, that where one branch of evidence depends upon another, if you destroy one, both fall to the ground. But assuming that the whole letter was admissible, still the learned Judge ought to have left it to the Jury, simply to say aye or no, whether they were satisfied that *Shanahan* did or did not indorse the bill. Now this he did not do, but on the contrary, he directed the Jury, that in point of law, the proof of identity was sufficient. This was misleading the Jury, and infringing upon their province, because it was laying down to them as matter of law, that which should have been left to them as a question of fact.

*Chitty*, contrà, was stopt by the Court.

BAYLEY, J.—The rule of law in actions of this nature is, that there must be sufficient evidence to satisfy the Jury

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that the bill was indorsed by the person whose indorsement it purports to bear. The question then in this case is, first, was the evidence admissible; and second, did the learned Judge misdirect the Jury in telling them that it was sufficient? With respect to the first, I am clearly of opinion, that the evidence was admissible. I do not mean to say, that the letter was to be taken as evidence of all that it contained; but I think that the possession of it by the person calling himself *Edmund Shanahan*, was evidence to go to the Jury, as shewing that he was the real *Edmund Shanahan*. Generally speaking, possession of property is primâ facie evidence of a right in it, and that has always been held to be the rule with respect to documents. Here is a genuine bill of *Bulkeley* and *Son:* who ought to have the possession of such a bill? When I find a man in possession of that which is saleable property, he is primâ facie the owner of it. But here I also find the same person in possession of a genuine document, which ought to be in the possession of the person named therein. The letter of recommendation is an additional step; a person calling himself *Shanahan*, is in possession of it, and also of a genuine bill drawn by *Mac Donnell* and *Co*. He is therefore, in addition to the bill in question, in possession of a letter, and of other bills. I do not rely upon the 640*l.* bill so much, because it did not appear to whom that was made payable. This person, indeed, was only primâ facie owner of these documents, but primâ facie evidence is evidence for a Jury, if it is not rebutted. The other facts of the case, however, tend strongly to confirm it: *Shanahan* comes to *Cadiz*, and remains there ten days; he holds himself out to the plaintiff as the real *Edmund Shanahan*; he dines with him every day; nothing occurs to excite any suspicion of his identity; and in the course of his stay, he leaves the bill in the plaintiff's hands for a whole day; and exposes himself throughout to every mode of detection. Under all these circumstances, I cannot but think the evidence admissible. Then, was it sufficient to go the Jury? In all

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cases like the present, it is proper to consider, not only the proof adduced by one party, but also that which might have been brought to rebut it by the other. The cross-examination as to the bill for 640*l.* raises the presumption that it was made payable to *Shanahan*, and the same observation applies to the other bills. If *Shanahan* was not the payee, the question naturally arises, who was? If any other person was the payee, he would have been a competent witness to prove his right as such, that the bill had been lost by or stolen from him, and that the indorsement was not his. Again, the bill was drawn by *Bulkeley* and *Son*; did they draw it, not knowing who the payee was? Such a proceeding is not common. But if they did, still the bill-broker who introduced the real *Shanahan* to them, might have been called to prove that the indorsement was a forgery. Some observation has been made as to the bill drawn by *Mac Donnell* and *Co.* being refused payment on the ground of forgery. That fact was got out upon cross-examination, and therefore the present plaintiffs must have known all about that bill previous to the trial, and might have collected evidence to meet it. Although the action was commenced in *March*, 1816, the cause was not tried till *July*, 1821, and therefore the defendants had ample time to ascertain all the facts necessary to their defence. In all that interval no person came forward to claim the bill; was it not therefore the most reasonable presumption for the Jury to draw, that the indorsement was genuine? As to the objection raised to the direction given by the learned Judge to the Jury, I can only say, that he seems to me to have said precisely that which the law says. If I had tried the cause, I should have left the case to the Jury just as he did, and in my opinion the Jury came to a sound and just conclusion. I am therefore of opinion, that the judgment of the Court below must be affirmed.

HOLROYD, J.—I have all along thought this a very plain case, and have never been able to bring my mind to doubt

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upon any of the points raised in argument. The conclusion which the Jury have drawn, it is not within our province to control. The real objection insisted on is, that the evidence was not admissible, or that it was not sufficient to go to the Jury. If the defendants in the action knew what evidence would be offered, they should have demurred to it; if the evidence was unexpected by them, they should have applied to the learned Judge to strike it out, and upon his refusing so to do, they might have tendered a bill of exceptions. But if the objection was to the effect of the evidence, there clearly should have been a demurrer, and not a bill of exceptions. I think the learned Judge was right upon both points. The question in the cause was, whether the person in possession of the bill was the real *Shanahan*. His passing by that name was primâ facie evidence of his identity; and if that was to be disputed, then, according to *Mead* v. *Young* (*a*), contrary evidence ought to have been given by the defendants, and yet, notwithstanding the length of time the trial was delayed, no such evidence was adduced. I entirely agree in every word the learned Judge uttered to the Jury, and I think he was perfectly correct in stating that great inconvenience would arise in the commercial world, if the negotiability of bills of exchange was to be clogged by a rigid exaction of demonstrative proof of their indorsement. I think the evidence of the indorsement of this bill was quite sufficient to satisfy any reasonable mind of the fact, and I concur in the decision, that the judgment must be affirmed.

BEST, J.—I have felt very considerable doubts whether the preliminary objection suggested by my Brother *Bayley*, was not decisive of this case, and consequently whether it was properly open to us to entertain any discussion upon its merits. The two modes of proceeding alluded to, one by bill of exceptions, and the other by demurrer to evidence, have never yet been distinctly and satisfactorily defined.

(*a*) 4 T. R. 28.

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Lord Chief Justice *Eyre*, in his judgment in the case of *Gibson* v. *Hunter* (*a*), expresses his own doubt, and that of ten other of the Judges, as to the separate office and properties of the two proceedings; and I confess that I am now of opinion that the objection, if available, might be taken advantage of. It seems to me, that the statute which introduced the bill of exceptions (*b*), ought to be construed as liberally as possible in favor of the suitor, as well as on behalf of the Judge; and Lord *Coke*, in commenting upon the statute says, "that it extends to any material evidence offered to the Jury, and over-ruled by the Judge (*c*). Consistently with this principle, I think it ought also to extend to cases where evidence is objected to as insufficient, and is admitted by the Judge, which is the present case. A demurrer to the evidence, is in substance, where the party says, "I will not have my case prejudiced by having it left to the Jury, and therefore I will take it out of tho power of the Jury to dispose of it at all." The suitor, however, cannot be allowed to stand in a better situation under a bill of exceptions, than he would be on a demurrer to the evidence. By a demurrer to the evidence, he admits the truth of the facts, and only questions the conclusion that is drawn from them. Now, in the case before the Court, the bill of exceptions admits that the evidence was admissible, but it denies the truth of the conclusion of identity which is attempted to be drawn from it. The whole of the evidence, therefore, is upon the record, and if that furnishes any one fact from which the Jury might reasonably infer the identity of the indorser, that is sufficient to sustain the judgment. It appears to me, that it does furnish several such facts. A person, calling himself *Edmund Shanahan*, comes to *Cadiz*, having in his possession the bill in question, and a letter of recommendation from *Lisbon*, both made in favor of *Edmund Shanahan*. If a man in *London* produces a letter ad-

(*a*) 2 Hen. Bla. 187.
(*b*) 13 Ed. 1. c. 31.
(*c*) 2 Inst. 427. Vide Dyer, 231, pl. 3. 1 Ld. Raym. 486.

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dressed from *York*, the inference is, that he brought it from *York*. There is no evidence of the bill having been lost or stolen, and therefore the mere possession of it raises the presumption, that the possessor is the owner of it; and what is *presumption* but a legal term for *probability*? Such evidence is cogent in the first instance; but if it remains unrebutted, it becomes conclusive. This case must be tried by the same rules with every common case of an action by an indorsee against an acceptor. If a bill be made payable to *A. B.* or order, it is enough to prove the hand-writing of *an A. B.* unless some peculiar circumstances render more distinct proof necessary. In such a case no man ever heard of calling a witness to prove that *A. B.* was the party in whose favor he had drawn, and to whom he had delivered the bill. If that is the case with respect to inland bills, where it is comparatively easy to procure additional evidence, how much more ought it to be so with respect to foreign bills, where the difficulty of proof is so greatly increased? It has been said, that the best possible evidence ought to have been produced. I think the best possible evidence has been produced of the facts which were proved, and the objection, in reality, seems rather to be, that more facts were not proved; but if such an objection were to be admitted, there would be an end at once of all presumptive evidence. Here I think it was quite enough to prove that a person calling himself *Edmund Shanahan*, appeared openly in *Cadiz*, with the bill in his possession. The only case which I recollect as at all applicable to the present, is that of *Nelson* v. *Whittall* (a). That was an action by the indorsee against the maker of a promissory note, attested by a subscribing witness, who was dead; and there it was held that evidence of *his* hand-writing, and that he signed his name in the presence of the defendant, was sufficient, without proving the defendant's own hand-writing. Now that case seems to me stronger than the present, because the mere fact of the defendant

(a) 1 B. & A. 20.

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being in the room when the note was attested, did not necessarily prove that he was the party who made it; he might have been an accidental spectator. In this case the act of the indorsement was clearly proved, and I think there was abundant evidence for the Jury to conclude that the party making that indorsement was *Edmund Shanahan*, the real payee.

Judgment affirmed (*a*).

(*a*) Vide *Hennell* v. *Lyon*, 1 B. & A. 182. *Doe* v. *Smith*, 1 Campb. 196.

## In Re GILPIN, a Bankrupt.

Where *A.*, the dormant partner of *B.*, in a trading firm, allowed the latter, on the dissolution of the partnership, to remain in the order and disposition of the partnership property, effects, and debts; and *B.*, after continuing in trade for about two years afterwards, on his sole account, became bankrupt:— Held, that *A.*'s share of the partnership property and effects, and of the debts due on the partnership account at the time of the dissolution passed to *B.*'s assignees under 21 *Jac.* 1. c. 19. s. 11.

THE following case was sent by his Honor the Vice-Chancellor, for the opinion of this Court:—

This case arises out of a petition presented to the Lord Chancellor by *Samuel Enderby*, praying amongst other things, that the commissioners acting under the commission against the said *William Gilpin*, might be directed to keep a distinct account of the estate and effects of the co-partnership hereinafter mentioned, and that the assignees and commissioners might be directed to apply the same in discharge of the outstanding debts of the co-partnership then remaining unsatisfied, or pay over the same to the petitioner for the purpose of making such application, and that the petitioner might be at liberty to prove under the commission a sum of 15,902*l.* 19*s.* 8*d.* hereinafter mentioned. In the month of *September*, 1807, a partnership was formed between the bankrupt and *Samuel Enderby*, on the terms contained in a deed of co-partnership, bearing date 24th *September*, 1807, made between them (*a*). *Gilpin*, during the partnership, carried on and conducted the business in his own name alone, without any interference by or on the part of *Enderby*, who took no part whatever in the conduct and management of the partnership business and concerns, and did not appear,

(*a*) Vide ante, vol. i. 570, where the terms are fully set out.




and was not known to the world as a partner, but was a sleeping or secret partner, and whose name did not ever appear as a partner in the partnership books. After the 24th *September*, 1817, when the partnership determined, until the month of *April*, 1819, when *Gilpin* became bankrupt, he continued to carry on the trades of army clothier, army agent, and woollen draper, as well as his other business of a general merchant, in his own name, and on his own account, and with the same capital, property, stock, and effects, and in the same manner as he had before carried on the same during the partnership, and he received some of the debts which were due to him as a partner with *Enderby*, and paid all the debts which were due from him, as well on his own account, as in respect of the partnership business, without any interference by or on the part of *Enderby*; and in the course of carrying on such business, after the determination of the partnership, *Gilpin* contracted debts with various persons, which debts remain unpaid. *Gilpin* having committed an act of bankruptcy, a commission issued against him, dated 1st *April*, 1819, under which assignees have been appointed. After the determination of the partnership, and before the bankruptcy of *Gilpin*, he paid to *Enderby* a part of the principal sum of 20,000*l.* and at the time of the bankruptcy, there was due from him to *Enderby* a sum of 15,902*l.* 19*s.* 8*d.*, part of that principal sum, and an arrear of interest. At the time of the bankruptcy of *Gilpin*, his property consisted of goods and merchandize, part of which had been the partnership property, but with which he continued to carry on business after the determination of the partnership, and also of debts due to him, part of which had been contracted during the partnership, and was due to the partnership. *Enderby*, after the bankruptcy, was called upon to pay, and did pay, debts of the partnership to a very great amount, no part of which has been repaid to him out of or by means of any partnership effects. *Enderby* contends, that all the property which had belonged to the partnership at the time of the determination thereof,

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which remained at the time of the bankruptcy of *Gilpin*, and the debts due to the partnership, which were unreceived at the time of the bankruptcy, are still partnership property, and joint estate, and are applicable, as such, to the payment of the partnership debts. The assignees, on behalf of themselves, and the subsequent creditors, allege, that all the property and effects of the partnership, and the debts remaining due to *Gilpin*, became his separate estate, and were in the order and disposal of the bankrupt, and of which he was the visible owner, at the time of his bankruptcy; and that all such property and debts became vested in them (the assignees) for the benefit of the general creditors of the bankrupt. The question, therefore, for the opinion of the court is, whether the property and effects of the late partnership, and the debts due to *Gilpin*, on the partnership account, at the time of the expiration thereof, and at the time of the bankruptcy of *Gilpin*, or any, and what part or parts of such property, effects, and debts, were in the order and disposition of the bankrupt at the time of his bankruptcy, within the intent and meaning of the statute 21 *James* 1. c. 19. s. 11.

*Campbell*, for the assignees. The whole of the estate, debts, and effects, joint and separate, passed to the assignees under the commission against *Gilpin*. [*Best*, J. Is it contended that *Enderby's* moiety of the *debts* passed under the assignment?] Certainly: it has been repeatedly decided that debts, as a general article of property, do pass. Debts are goods and chattels within the meaning of the bankrupt laws; and to such an extent has this principle been carried, that even the good-will of a newspaper, which is property wholly of an abstract nature, has been held to pass to assignees. Assuming, therefore, for the present that there is no distinction between debts, and other property of a bankrupt, this case falls within the operation of the 21 *Jac.* 1. c. 19. s. 11. *Gilpin* became bankrupt in 1819, and was at that time in possession of the whole estate and effects, as

sole reputed owner. The world never heard of *Enderby's* name as connected with the partnership. *Enderby* expressly renounced all management of, or control over the business, and his connection with it was kept a profound secret to all the world. [*Bayley*, J. Was not the house publicly known under the firm of "*Gilpin and Co.*?"] It does not appear that it was. No other name appeared in the books than *Gilpin's*, and therefore the case comes within the words of the statute. The mischief against which the statute was directed, was the obtaining a false credit, which the bankrupt was clearly enabled to do by the exclusive possession and management of the joint property. In this case the Court are not called upon to go further than to decide, what is the effect of a bankruptcy taking place eighteen months after the expiration of a partnership, one partner being, during all that period, allowed to remain in the business, and carry it on as the only ostensible owner and proprietor. It has been frequently determined that the title of a mortgagee shall not prevail against the claim of creditors, but it seems to have been doubted in the Court of Chancery whether *Enderby's* title differed from that of a mortgagee. The case of *West* v. *Skip* (*a*), however, is a strong authority to shew that *Enderby's* moiety did pass to his assignees. In that case a partnership existed between *Skip* and two persons named *Ralph* and *James Harwood*. Differences having arisen, it was agreed that the partnership should be dissolved from a day certain, and that *Ralph* should pay *Skip* a sum of money. *Ralph* did not pay the money, but afterwards contrived to get effects belonging to the partnership secretly into his possession. This produced a commission of bankrupt by the other creditors, and a bill in equity by the assignees, in which they contended that *Skip* had no property as against them. *Skip*, on his part, also filed a bill to have the partnership estate divided for the satisfaction of his claim. There was *no consent* on the part of *Skip* to *Ralph's* obtaining or keeping possession of the partnership property.

(*a*) 1 Ves. 239.

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Lord *Hardwicke* was of opinion that the case was not within the statute, and said, "what I found myself upon is, that by the enacting clause, to subject goods to the creditors of another person, those goods, at the time of the bankruptcy, should be left in the possession, order, and disposition of the bankrupt, so, that he might take upon himself to sell or dispose as owner; and there has been no case upon this act, nor ever will be, wherein a Court of law or equity will do so severe a thing as to subject the property of one to the debts of another, *without proof of the consent of the real owner, to leave them in the power of the bankrupt, (possession only not being sufficient), or a laches in letting them remain there, so as to give him a false credit.*" The words, "without proof of the consent of the real owner to leave them in the power of the bankrupt," shew Lord *Hardwicke*'s opinion to have been that as one partner retires, and leaves his share of the partnership effects in the power of another, (which is precisely the present case) the whole must be considered as being "in the possession, order, and disposition," of the remaining partner, within the statute. The case *Ex parte Flyn* (a), is not an authority against this, because there the vendor was allowed to remain in possession merely as a factor, and on that ground it was held that the goods did not pass to the assignees. In *Burford* v. *Dommett* (b), the partnership was denied, but Lord *Alvanley* there said, "upon the claim of partnership set up by this plaintiff, I have great doubt whether, under the statute of King *James*, this sort of partnership could be set up; whether it is not the property of the bankrupt, in respect of the bankruptcy, upon the fact itself." The case of *Caldwell* v. *Gregory* (c), decided in the Exchequer Chamber, will no doubt be relied upon on the other side. That was an action of trover by the assignee of *Hatfield*, a bankrupt, against the defendant, who had been a sleeping partner with *Hatfield*, in a brick manufactory, his name being, at his own request, concealed, and *Hatfield* appearing to the world as

(a) 1 Atk. 185. (b) 4 Ves. 761. (c) 1 Price, 119.

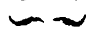
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the sole owner, to recover the value of a quantity of bricks, the property of the partnership, some of which the defendant had carried off the premises after the act of bankruptcy, and others, after the commission sued out. At the trial the plaintiff had a verdict, subject to the opinion of the Court, and it was decided, on argument, that the action could not be maintained. But, it may be observed in the first place, that great doubt was thrown upon that case by the Lord Chancellor in *Ex parte Dyster* (a), where he says, "as to the first question, whether the assignees had a right to possess the joint property of *Dyster* and *Moline*, of which the latter only was the visible owner, it is the case, which of all others seems to come within the act (21 *Jac.* 1. c. 19.); and I think I should have no difficulty in persuading the barons, who decided *Caldwell* v. *Gregory*, that the report which is given of the case, is, to say the least, not satisfactory." In that case, however, it was not *agreed*, as it was in the present case, that the bankrupt should be the ostensible owner, and continue in the exclusive possession of all the remaining joint property; but the agreement was, that there should be a division of the effects, which division there was not time to complete by the removal of the defendant's share before they were seized under the commission.

*Parke*, for the petitioner. Mr. *Enderby*'s moiety of the property did not pass to the assignees of *Gilpin*. If the decision in *Caldwell* v. *Gregory* is over-ruled, very serious mischiefs will ensue. Supposing *Enderby* to remain solvent, he will have to pay all the partnership debts, and will be debarred from receiving any of the joint property. It is therefore reasonable that he should petition to have distinct accounts taken of the joint and separate funds. [*Bayley*, J. That is, *Enderby* prays that the joint funds may be applied exclusively to the payment of the joint creditors; that, the separate creditors oppose; and, where a man appears as a sole and separate trader, I am at a loss to conceive why a

(a) 2 Rose's Bank. Ca. 256. 349.

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distinction should be made between one class of creditors and another.] This case depends upon the construction of the statute of *James*, and the question is, whether property, found to have been originally partnership property, but continuing after the expiration of the partnership, *by lapse of time only, and according to the original agreement*, in the hands of the ostensible partner, does, or does not pass to his assignees. In *Kirkley* v. *Hodgson* (*a*), it was held, that the property did pass. But upon what ground? Because it had been originally in the sole possession and ownership of the bankrupt. Here, the property was from the very first the joint property of *Enderby*, and of *Gilpin*; the case of *Caldwell* v. *Gregory* therefore is precisely in point, and is a clear and express authority for saying that this case is not within the statute. A contrary decision will have the effect of putting an end to dormant partnerships altogether. The statute in question slept during a century without being acted upon. Its language does not admit of the most intelligible construction; the observations made upon it by Judges at different periods shew that its policy is not free from objection, and indeed, the greatest possible difference of opinion has existed between Judges as to its construction. It seems only calculated for a state of trade simple in the extreme, and the expediency of extending its operation, beyond the line which its words strictly warrant, seems very questionable. The legislature have shewn, that they think it ought not to extend to the shipping interests, by enacting in the very last session of parliament (*b*), "that the right or interest of an assignee or mortgagee of a ship, or a share therein, shall not be affected by any act or acts of bankruptcy committed by the assignor or mortgagor, notwithstanding such assignor or mortgagor, at the time he shall become bankrupt, shall have in his possession, order, and disposition, and shall be the reputed owner of the said ship or share thereof." The operation of the statute, as respects the title which it gives to assignees, may be considered in

(*a*) Ante, vol. ii. 848. (*b*) 4 *Geo.* 4. c. 41. s. 44.

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four points of view. First, that mere possession will not pass the property; second, that the statute cannot apply where the bankrupt has any real title or interest in the effects in his possession; third, that it applies only to cases where a false credit has been obtained; or, fourth, where the possession is with the consent of the true owner, and consequently that it does not apply where the true owner has divested himself of power to retake possession. In none of these views will it be found that the statute applies to the present case. In support of the first proposition, Lord *Shaftesbury* v. *Russell* (*a*), *Mace* v. *Cadell* (*b*), and *Ex parte Martin* (*c*), may be cited. The second is warranted by the opinion delivered by Lord *Hardwicke*, in *Ryall* v. *Rowles* (*d*), where his Lordship said, speaking of this statute, "the legislature has explained its sense by putting the words *true owner* in opposition to the words *reputed owner*;" and by that of Lord *Redesdale*, in *Joy* v. *Campbell* (*e*), where he says, "the statute has always been construed to mean possession of the property of another with the consent of that other." [*Best*, J. That was the common case of an executor.] And the statute cannot apply to executors, administrators, or trustees, because they are real, as well as reputed owners. [*Best*, J. Or perhaps for a still stronger reason, because if it did, the business of human life could not be carried on.] If the question be put upon the necessity of the case, that argument will equally apply to dormant partners. [*Bayley*, J. Why so? Are they necessary? Why *must* a man hold out false colours to the world?] Whenever it shall become necessary the connection will be made known; it cannot then be hid, because the books will shew it. [*Bayley*, J. The books would not shew it in the present case.] *Ex parte Flyn* (*f*) is also an authority directly in point. [*Bayley*, J. *Flyn* never consented that *Mathews*

(*a*) Ante, 84.

(*b*) Cowp. 232.

(*c*) 2 Rose's Bank. Ca. 331.

(*d*) 1 Ves. 348. S. C. 1 Atk. 176. 1 Wils. 260.

(*e*) 1 Sch. & Lef. Irish C. C. 328.

(*f*) 1 Atk. 185.

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should dispose of his share of the property; here *Enderby* does consent that *Gilpin* shall sell his (*Enderby's*) share, as of and for himself.] *Collins* v. *Forbes* (*a*) is another authority in favour of the present argument, and to the same point. These parties are in fact tenants in common of the property, and upon that principle the case is exempt from the operation of the statute. The third proposition, that the statute applies only to cases where a false credit is obtained, scarcely requires any argument or authority to support it. If a party really has a right to possession, no false colours are held out, and no false credit is given or obtained. Here, *Gilpin*, as tenant in common with *Enderby*, had a right of possession; and whatever inconvenience may be apprehended from the possibility of a false and delusive credit, the Court will not break down a rule of law so clear as that established by *Caldwell* v. *Gregory*, a case decided after mature deliberation; nor will they step forward to act as legislators, by enlarging the operation of a statute, which the legislature themselves have so recently found it politic to narrow and restrain. But, fourth, the statute does not apply where the true owner has divested himself of power to retake possession. For instance, it has been always held that it did not apply to ships at sea, because the purchaser cannot take possession of property so circumstanced. Yet a merchant in *Dublin*, furnishing tackle or provisions on credit, would believe the ship coming from an *English* port, to be the property of the person in whose possession he found her; so that mere apparent credit to the world is not the true ground upon which this case ought to be decided. [*Bayley*, J. Not *mere* apparent credit; but apparent credit *with the consent of the owner*, is.] This doctrine is fortified by the authority of *West* v. *Skip* (*b*), in its result, for there Lord *Hardwicke* held, that the case was not strictly within the preamble of the clause, and ruled the same point himself on another ground. Here the statute cannot apply, because it is not competent to one tenant in common to take

(*a*) 3 T. R. 316. (*b*) 1 Ves. 239.

possession of the common stock to the exclusion of another: all that the law allows him is, to take possession when the goods are vacant. [*Bayley*, J. This is not a case of negligence merely, but of a person bargaining à priori that the world shall be imposed upon. A tenant in common has a right to exercise several acts of ownership. If this room were full of books belonging to two tenants in common, in whose possession would they be?] He that had the key of the door would have the actual possession; both would have a possession in law. [*Bayley*, J. But either of them might break open the door, and remove the books; what then becomes of the position that a tenant in common has no right to take possession?] One would have no right to turn the other out of possession, and that is all that is now contended for. One partner must remain in possession for the purpose of winding up the partnership accounts. [*Bayley*, J. Why must he?] That is the course invariably pursued. [*Bayley*, J. Perhaps so; but it is merely an arrangement made between themselves, for their own mutual convenience; the world is no party to it.] The case of *Caldwell* v. *Gregory* is a direct authority in point, and if the decision there be law, it must govern this Court in its judgment. It only remains to add, that if debts are to pass under this statute, it is difficult to say how the dormant partner can save himself; for he has no means of getting possession of them. [*Bayley*, J. His course is very plain and simple. He has only to give notice to the debtors to pay them over to himself only.]

*Campbell*, in reply. The four propositions advanced on the other side, abstractedly considered, cannot be disputed; but the corollary from the second, and the conclusion drawn from them all, must certainly be denied. It is granted, first, that mere possession will not pass the property; as, if a man takes ready-furnished lodgings, and becomes a bankrupt, the furniture will not pass to his assignees. But that is not the present case. It is also admitted, that if the bankrupt be

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at once the apparent, and the true owner, the goods are not liable; but, the question here is, what is to become of *Enderby's* moiety? *Enderby* is clearly the true owner of a moiety, but who is the apparent owner? *Gilpin*; and as such, he was in possession of goods of which he was not the true owner, with the consent of the true owner. The third proposition requires no argument on one side or the other, but as the possession here was colorable, and as it was calculated to procure a false credit to the bankrupt, the case upon that principle is within the statute. As to the fourth point, *Enderby* had not divested himself of all power to retake possession; he might have filed a bill in equity, or have done various other acts, to reduce his moiety into his own possession; instead of this, he chuses to lye by, and permit *Gilpin* to retain the possession, and act as sole ostensible owner of the whole property. Upon every point raised therefore, this case is within the operation of the statute.

The following certificate was afterwards sent to his Honor the Vice-Chancellor:—

This case has been argued before us, and we are of opinion that the property and effects of the late partnership, and the debts due to the said *William Gilpin*, on the partnership account, at the time of the expiration thereof, and at the time of the bankruptcy of the said *William Gilpin*, were in the order and disposition of the bankrupt at the time of the bankruptcy, within the intent and meaning of the 21st *James* 1.

J. Bayley.
G. S. Holroyd.
W. D. Best.

Thomas and Another, Assignees of Hobson, a Bankrupt, v. Heathorne.

To a declaration in assumpsit by the assignees of a bankrupt for 1000*l.*, had and received, defendant pleaded, that on an account stated between him and the bankrupt before the bankruptcy, he (defendant) was found to be indebted to bankrupt in the sum of 400*l*.; that bankrupt drew a bill of exchange upon defendant for the said sum of 400*l.*, payable to him or his order, which defendant accepted, and returned to bankrupt, whereby defendant became and was and still is liable to pay said sum of 400*l.* to bankrupt or his order, or to his assignees or their order; replication, that before the bankruptcy the bill became due, and was presented to, and refused payment by, defendant, who still refuses to pay the same to the assignees:—Held, on general demurrer, that the defendant's plea was no answer to the action.

ASSUMPSIT for 1000*l.*, had and received by the defendant to the use of the bankrupt, with the other money counts. In the first sett of counts the promise was alleged to have been made to the bankrupt; and, in the second, to the plaintiffs, as his assignees. Pleas, first, non assumpsit; second, that on an account stated between the bankrupt and the defendant, before the bankruptcy, the defendant was found to be indebted to the bankrupt "in the sum of 400*l.*;" that the bankrupt drew a bill of exchange upon the defendant "for the said sum of 400*l.*," payable to him or his order, which the defendant accepted, and returned to the bankrupt; "whereby the defendant became, and was and still is liable to pay the said sum of 400*l.* to the bankrupt or his order, or to his assignees or their order." Replication to the first plea, a similiter; and to the second, that before the bankruptcy the said bill became due, and was presented to the defendant for payment, but that he refused to pay the same to the bankrupt, and still refuses to pay the same to the plaintiffs as his assignees. General demurrer to the second replication, and joinder in demurrer.

*Campbell*, in support of the demurrer. The question is, whether the defendant's special plea is an answer to the action; and, upon the authority of *Kearslake* v. *Morgan* (a), it seems to be so. [*Bayley*, J. In this case the plaintiffs claim a different sum of money from that stated in the plea. The declaration contains eight counts, in each of which a sum of 1000*l.* is demanded. The plea seems to be pleaded generally to the whole, and alleges that the defendant was indebted to the bankrupt "in the sum of 400*l.*;" but it does

(a) 5 T. R. 513.

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not go on to say, "and no more." In this respect the present case essentially differs from that of *Kearslake* v. *Morgan*.] That objection might be of weight if the demurrer were special, but the defendant has demurred generally. The import of the plea clearly is, that 400*l*. *and no more* was the balance due between the parties, and that may reasonably be inferred from its language. If so, the plea is sufficiently certain to support a general demurrer; for which certainty to a general intent only is required. In *Richardson* v. *Rickman* (*a*), cited in *Kearslake* v. *Morgan* (*b*), which was an action for goods sold and delivered in the common form, the defendant, after the general issue, pleaded a plea similar to the present, so much alike indeed that one appears to have been copied from the other. To that plea the plaintiff demurred generally, and judgment was given for the defendant. [*Bayley*, J. Was that plea pleaded to the whole declaration?] That does not appear by the report; but from the statement of the case it would certainly be presumed that it was. There is nothing to shew that it was pleaded specifically to any one count. [*Bayley*, J. I think it is most probable that it was pleaded to a part of the declaration only, and if so, it will not apply to this case.] For all that appears, this bill may have been negociated either by the bankrupt or his assignees. The probability is, that it has been negociated, and that it is now outstanding in the hands of some third person. If that is the case, the delivery of the bill becomes equivalent to payment; *Louviere* v. *Lanbrày* (*c*), where it is said, "when a merchant draws a bill upon his correspondent, who accepts it, this is payment; for it makes him debtor to another person, who may bring his action." The fact, however, is exclusively within the knowledge of the plaintiffs, but they do not chuse to state whether the bill has been negociated or not. The fair inference arising from their silence upon the point is, that the bill has passed into the hands of a third person, and then, if this demurrer is not allowed, great hardship will be

(*a*) B. R. Mic. 16 Geo. 3. (*b*) 5 T. R. 513. (*c*) 10 Mod. 3[illegible]

imposed upon the defendant; for he will then be rendered liable for the amount of the bill twice over, first to the assignees of the bankrupt, and next to the holder.



*Tindal*, contrà, was stopt by the Court.

BAYLEY, J.—I am of opinion that the plaintiff is entitled to judgment. It is perfectly clear, that if a defendant pleads as an answer to the whole declaration that which is in fact an answer only to a part, his plea is bad (*a*). Now this plea is pleaded as an answer to the whole declaration, which contains eight counts, and in each the plaintiffs allege that the defendant is indebted to them in the sum of 1000*l.* The defendant says in answer, that after the making of *the said several promises*, &c. there was an account stated between him and the bankrupt, on which account he was found to be in arrear and indebted to the bankrupt in the sum of 400*l.*; not saying 400*l. and no more*; and that for that sum he accepted the bankrupt's bill, and returned it to him. He does not therefore allege that he was not found to be indebted to the bankrupt to a larger amount than 400*l.* Now a payment of 400*l.* cannot by law be pleaded as a satisfaction for a claim of 1000*l.*, and consequently the payment of the bill, admitting it to have been paid, is no discharge beyond that amount. Upon the ground therefore that the plea purports to be an answer to the whole declaration, and is in fact an answer to a part only, it cannot be supported, and the plaintiffs are entitled to judgment.

HOLROYD, J.—Consistently with the allegation in this plea it may be true that 400*l.* was due, and that the parties had not gone on far enough in the account to ascertain how much more was due. It may therefore be equally true that 1000*l.* was ultimately found to be due. Nothing beyond this can be inferred from the plea, because it does not deny that more than 400*l.* was due. Then, as the declaration

(*a*) Vide Earl *St. Germain's* v. *Willan*, ante, 111.

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avers 1000*l.* to be due, and the plea does not traverse that averment, we must presume the larger sum to be really due. You cannot plead payment of a smaller sum in discharge of a larger, and therefore the acceptance of a bill of exchange for 400*l.* is no discharge of a debt of 1000*l.*

BEST, J., concurred.

Judgment for the plaintiffs on demurrer.

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BRITTEN and Another *v.* W. WEBB.

*A.* after drawing a bill of exchange on *B.* which was accepted by the latter, indorsed it to *C.* who re-indorsed it to *A.* in pursuance of an agreement (without consideration) that he should do so, as security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable. On demurrer to a declaration against *C.* upon the bill, in the usual form, alleging the special circumstances under which the defendant became indorser:— Held, first, that the action could not be maintained on the bill, and second, that the agreement to indorse was void for want of consideration.

THE plaintiffs declared upon a bill of exchange drawn by themselves upon, and accepted by one *Francis Webb*, payable to the plaintiffs, or their order, indorsed by them to the defendant, and afterwards re-indorsed by the defendant to the plaintiffs. The first count was upon the bill, in the usual form, but containing an allegation that at the time when the bill was drawn and indorsed by the plaintiffs, it was agreed between them and the defendant, that the latter should put his name upon it, merely as a security for the payment of it by the acceptor; that no consideration passed to the defendant for his indorsement, but that it was done only for the purpose of rendering the bill more negotiable. There was a second count upon the bill simply and the money counts. Demurrer to the declaration, and joinder in demurrer.

*Abraham*, in support of the demurrer, was stopt by the Court.

*Tindal*, contrà. The plaintiffs may, perhaps, have resorted to a clumsy method of obtaining the security of a third person for the payment of the bill, but if the declaration had been framed wholly in the common form, it

would not have been sustainable. The allegation, however, which is introduced into it, brings the case within the principle adverted to by Lord *Kenyon*, C. J. in *Bishop* v. *Hayward* (a). That was an action upon "a promissory note, made by one *Collins*, payable to the plaintiff or order, and afterwards indorsed by him to the defendant, who afterwards re-indorsed it to the defendant again." The declaration was in the common form, and it was held, that it could not be supported, because it would introduce a circuity of action, which the law did not permit. But Lord *Kenyon*, in his judgment, says this, "I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, e. g. that his own name was originally used for form only, and that it was understood by all the parties to the instrument, that the note, though nominally made payable to the plaintiff, was substantially to be paid to the defendant, but if such were the case, the note should have been declared on according to its legal import." Now the allegation introduced in the first count here, seems to be substantially within the rule thus laid down, and is therefore sufficient to support the declaration, inasmuch as it obviates the difficulty which would otherwise occur, of a circuity of action.

ABBOTT, C. J.—The defendant is clearly entitled to judgment. If we are to consider this as a declaration upon a bill of exchange, according to the usage and custom of merchants, it is quite plain that the plaintiffs cannot recover upon it, for the reason conceded in argument. If we are to regard it as founded upon a special contract, it is equally insupportable, because it shews no consideration for the defendant's indorsement; and therefore the plaintiffs would have had no cause of action if the defendant had refused to indorse. The declaration is consequently bad in both points of view (b).

(a) 4 T. R. 470. See 1 H. Bl. 569. Bull. N. P. 320. Ca. temp. Hardw. 118.

(b) See *Wain* v. *Walters*, 5 East, 10. *Saunders* v. *Wakefield*, 4 B. & A. 595. *Jennings* v. *Reynolds*, 3 B. & B. 11. and *Russell* v. *Moseley* Id. 211.

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BAYLEY, J.—The custom of merchants is the real foundation of this action; but in this declaration the plaintiffs allege both that they did and that they did not appoint the money to be paid to the defendant, which they cannot do in one and the same action. As to the special contract, there is no consideration upon which to found it, and therefore it cannot be supported.

HOLROYD, J.—The plaintiffs have no cause of action on either ground. Their own allegation shews that there was no consideration for the defendant's indorsement; and the action on the bill in its present shape cannot be maintained.

Judgment for the defendant (a).

(a) *Best*, J. was absent.

CASH and Another, Assignees of PACKWOOD, a Bankrupt, *v.* YOUNG, Gent.

Goods bonâ fide sold to, and paid for by, a customer, in the interval between a secret act of bankruptcy by the trader, and the suing out of a commission, are not recoverable in trover by the assignees, under 1 *Jac.* 1. c. 15. ss. 13 and 14.

TROVER for a carpet. Plea, Not Guilty, and issue thereon. At the trial, before *Abbott*, C. J., at the *London* adjourned Sittings, after last *Trinity* Term, after the usual proof of the proceedings under the commission, and of a demand and refusal, the following facts appeared. The bankrupt carried on business as a carpet manufacturer, without the limits of the city of *London*. He committed an act of bankruptcy on the 13th of *December*, 1822, and the commission against him was sued out on the 9th *January*, 1823. In the interval between those two days, the wife of the defendant purchased the carpet of the bankrupt, in his shop, in the ordinary course of dealing; a price was fixed upon at the time; the carpet and an invoice were sent home to the defendant's house the same evening, and on the ensuing day the money was paid to the bankrupt. The de-

fendant was furnishing a house, and really wanted the carpet for his own use; he had no knowledge of the bankrupt having committed an act of bankruptcy. The learned Judge left the case to the Jury upon the bonâ fides of the transaction, and they being of opinion that the goods were purchased in the usual course of trade, and paid for, before the commission issued, bonâ fide, and without any knowledge of the act of bankruptcy, the defendant, under his direction, had a verdict, with leave for the plaintiffs to move to enter a verdict for 3*l.* 11*s.* 9*d.*

*Tindal*, in *Michaelmas* Term last, moved accordingly, and obtained a rule nisi; against which

*Campbell*, now shewed cause. The assignees cannot maintain this action, either upon the facts, or the law. The Jury have found all the facts in favor of the defendant, and the statute 1 *Jac.* 1. c. 15, when construed with reference to those facts, will be found equally in his favor. To hold that this defendant is liable, would be a most alarming proposition; for after such a decision, no person out of the city of *London* could purchase goods in a retail shop and pay for them with safety. The principle would extend to the most trifling article, an apple, or an orange; the eating of which would be a conversion, and the purchaser might afterwards be harassed by an action at the suit of the assignees of the seller for the price, though he had in the first instance paid it down upon the counter. This is an argument ad absurdum, but it shews the inconvenience and injustice to which such a decision would lead. This is an equitable statute; it was passed for the relief of creditors, and it ought to be construed most liberally in their favor. Now it is plain from the language of the act, that a knowledge of the seller's bankruptcy is necessary to render the buyer liable to the assignees; in that case the assignees could not maintain an action for goods sold and delivered, upon the contract, and they cannot change the form of action. [*Bayley*, J. It

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was held by Lord *Kenyon*, in *Smith* v. *Hodgson* (a), that where the assignees could not maintain assumpsit upon the contract, they might disaffirm the contract and bring trover.] The object of the legislature was to put the assignees in the same condition as they would have been in if they had been paid for the goods. If this action can lie, the defendant is "endangered" within the very letter of the 14th section. He must pay the money twice over, and is wholly without remedy when he has done so. [*Abbott*, C. J. Does not that clause apply to sales before the act of bankruptcy, and payments after it? Here both the sale and the payment took place after the act of bankruptcy.] The words of the act will not justify any such distinction; the terms are "debtor" and "debt;" the defendant was a "debtor" of the bankrupt; he had made payment of a "debt" to him, and he made it "bonâ fide" and "before he knew" that he was a bankrupt. He is therefore "endangered" by this action, and consequently is within the protecting clause, both by the letter and the spirit of it. [*Bayley*, J. Can he be said to be without remedy? He may maintain money had had and received against the bankrupt; he has sold the defendant goods as his own, which in law were not his own; then the consideration wholly fails, and his certificate would not be a bar to an action against him for the price.] Under the 49 *Geo.* 3. c. 121. the certificate would bar such an action. [*Bayley*, J. If the assignees had affirmed the contract, and brought an action for goods sold and delivered, then payment to the bankrupt would have been a good answer; upon the same principle payment to the assignees in an action of trover, would support a subsequent claim for money had and received against the bankrupt.] No case can be found in which the certificate has not been held a bar to such an action. [*Bayley*, J. I think several such cases may be found. The effect of the cases I allude to is, that the commission relates back to the act of bankruptcy, and that only those debts which were in-

(a) 4 T. R. 211.

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curred previous to the act of bankruptcy are barred by the certificate.] The plain intent and effect of the statute is, that a bonâ fide payment prevents the assignees from disputing the sale; they must affirm the contract, because the law affirms it. [*Abbott*, C. J. I think that is not precisely the effect of the statute, and that the present argument assumes too much. The preceding section, 13, gives the commissioners absolute power "to grant and assign, or otherwise to order or dispose all or any of the debts due, or to be due, to or for the benefit of the bankrupt, by what person or persons soever; the 14th section is a mere proviso.] The act must be construed liberally, so as to render it an effectual guard against evils; the situation of the present defendant is an evil, from which the act ought to relieve him; if it cannot do that, it ceases to be what the legislature named it, a remedial act. [*Abbott*, C. J. Suppose the defendant had not paid for the goods; could the assignees have maintained assumpsit for the price? They might affirm the contract for themselves; but could they have sued as on a contract made by the bankrupt?] Undoubtedly they could. The act of bankruptcy would have been no defence to such an action; the whole object of the statute is to prevent the assignees from disputing the contracts made by the bankrupt. To that point *Wilkins* v. *Casey* (*a*) is an authority. [*Bayley*, J. That case goes only the length of establishing that the acceptance of a bill for the amount of a debt is equivalent to payment.] It is an authority for saying that the act was intended to protect bonâ fide payments made to bankrupts, and that it is to be construed liberally with that view. The case of *King* v. *Leith* (*b*) is distinguishable from the present. There the defendant had notice of the bankrupt's going to prison, which was an inchoate act of bankruptcy, and on that ground only the action was held maintainable. *Cole* v. *Robins* (*c*), however, is an authority directly in point, and fully supports the present arugment. If the present action is maintainable, the decision of Lord *Ellenborough* in that

(*a*) 7 T. R. 711. (*b*) 2 T. R. 141. (*c*) 3 Campb. 183.

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case (which the parties acquiesced in) must be over-ruled. It has never yet been impugned, and the Court will be warranted therefore in acting upon it, and in holding that the present rule ought to be discharged.

*Tindal*, contrà. This action is maintainable. Such a construction of the act may be productive of hardship in this particular instance; but the real bearing of the law must nevertheless be preserved. It is quite clear that by relation back the assignment operates from the period of the very *first* act of bankruptcy, and that the whole of the bankrupt's property, of what kind soever, is from that moment vested in the assignees. The 56 *Geo.* 3. c. 137. has introduced some qualifications into this part of the law, but the present case is not to be found among them. [*Bayley*, J. If the creditors forbear for some time to sue out a commission, may not the trader, during that interval, be considered as the agent of the assignees?] That must depend altogether upon the construction of the statutes; but certainly he would not be so considered, unless the interval between the act of bankruptcy and the commission were unusually and improperly protracted. [*Holroyd*, J. The length of the interval can hardly affect the question; for, how is it possible to draw the line?] An act of bankruptcy having been committed, these goods were the property of the plaintiffs the before sale to the defendant. The 19 *Geo.* 2. c. 32. s. 1, which provides that money bonâ fide received from a bankrupt, before notice of his insolvency, shall not be recoverable by his assignees, does not apply to the present case, nor has it been contended that it can; the question therefore rests exclusively upon the 1 *Jac.* 1. c. 15. Now, reading the 13th and 14th sections as they ought to be read, together, the defendant will appear wholly without the protection of the latter, because he was not "a debtor to the bankrupt" when he paid this money, but to his assignees, in whom the property in the goods had then vested. [*Bayley*, J. Was he not quodammodo a debtor to

the bankrupt? Might not the bankrupt himself have sued him for the money until the commission issued? The case of *Foster* v. *Allanson* (a) seems to decide that he might.] In that case no commission ever issued, which makes it mainly distinguishable from the present. The words "debtor to the bankrupt" must mean, properly, and de facto, his debtor. The 14th section is a mere proviso, referrible to, and dependent upon, the preceding clause, the object of which evidently is to give the assignees all the assets, of every kind, that are, or may become, owing to the bankrupt; and in that number surely debts contracted before he became a bankrupt must be included. [*Bayley*, J. Those contracted *after* certainly are; *Foxcroft* v. *Devonshire* (b); the words are "due, or to be due;" which would clearly transfer all future property and debts. *Abbott*, C. J. Suppose the case of a promissory note given to the bankrupt before the commission sued out; could the assignees declare upon that as upon a note made payable to themselves?] It should seem that they could not. [*Bayley*, J. Why not? According to the present argument that would be the legal operation of the note. By operation of law surely they might sue upon it as payable to themselves. The right to indorse would clearly be in them, and therefore the property in the note would be vested in them.] This statute was intended to protect certain payments made to bankrupts; but *payments*, in the strict sense of the word only. Money payments are protected, but not payments for goods; at least not the bankrupt's goods. If the goods are returned to the bankrupt, still the party is liable to the assignees for the price. This is a necessary inference from the 56 *Geo.* 3. c. 137. s. 1, which recites the protecting clause of the 1 *Jac.* 1. c. 15, and provides that persons shall not be "endangered" by the delivery of *goods* to bankrupts bonâ fide, and before notice of their bankruptcy. Here the assignees claim only their own property in specie. The 14th, or protecting clause of the 21 *Jac.* 1. c. 19. is equally decisive

(a) 2 T. R. 479. (b) 2 Burr. 931.

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on this point. It says "no *purchaser* for good and valuable consideration shall be impeached," &c. unless the commission be sued out within five years after the bankruptcy. That term "purchaser" must apply to *personal* as well as *real* property. [*Bayley*, J. It might be a very serious impeachment to a purchaser to take the *goods* from him, even though you repaid him the *price* he had given for them.] The comprehensive language of the 21 *Jac.* 1. c. 19; section 13 of which enables the commissioners, after tender of the price, to sell all "lands, tenements, hereditaments, goods and chattels, and other estates," granted to any person by a bankrupt, was thought to bear too hard; and therefore the 46 *Geo.* 3. c. 135. was passed, which protected all conveyances by, all payments to, and all contracts with, a bankrupt, made two months before the date of the commission. [*Bayley*, J. Suppose a trader possessed of 10,000*l.* stock; he commits a secret act of bankruptcy to-day, and sells the stock to me to-morrow; the commission issues against him this day month; can his assignees disaffirm the sale and claim the stock, in specie, from me?] Such a case would be within the exemption in favor of the city of *London*, but otherwise it would appear that they could. No payment made by the defendant to the bankrupt can bind the assignees, or diminish their rights; the bankrupt, in a case like the present, is by operation of law a wrong-doer, and not the agent of the assignees. *Copland* v. *Stein* (*a*). [*Bayley*, J. The ground of that decision was that the money was an *advance*, not a *payment*.] That indeed was one ground, but there were others. The reasoning of the judges there is very important, and applicable to the present case. Lord *Kenyon* says, "the argument of the defendants goes the length of asserting that, if a bankrupt, after a secret act of bankruptcy, sell or mortgage his estate, such sale or mortgage would be valid. It is true that if no commission be taken out for five years after the act of bankruptcy committed, such sale would be good: there is a statute limitation

(*a*) 8 T. R. 199.

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in such a case; but in no other case can such a sale be protected. In the present case the goods were delivered in *October*, 1796, but now it appears that the bankrupt, by having committed a secret act of bankruptcy two months before, was incapacitated from disposing of these goods to the prejudice of his creditors at large: this is a hard case on the part of the defendants, but we are compelled to decide against them by positive law, and can only say, *ita lex scripta est*. Again, it is said by *Grose*, J., " in this case some propositions are clear; the goods, when they came into the hands of the defendants, belonged to the assignees; they were delivered to them to be sold on the bankrupt's account, without the authority of the assignees; in the hands of the defendants they were still the goods of the assignees, unless there be any law to alter the property." These observations apply directly to the present case, and appear to be decisive. *Lawrence*, J. also adds, " It has been decided in a variety of cases that the legal effect of an act of bankruptcy is to enable the assignees, when a commission is sued out, to rescind all the contracts made by the bankrupt after the act of bankruptcy committed; and that relation takes place in all cases except the three which have been alluded to in argument, and which are excepted by the different statutes." [*Bayley*, J. The Court were of opinion that that case was not within the exception of the 1 *Jac.* 1. c. 15; the question now is, whether this case is or is not within that exception.] There are other cases which shew that it is not. *Hirst* v. *Gwynap* (*a*) is not distinguishable from the present; there indeed there was no actual payment made, but that is an immaterial circumstance, as appears from Lord *Ellenborough*'s reasoning upon the subject. If once there is an inchoate right of action in the assignees, it cannot be defeated by a subsequent payment to the bankrupt. [*Bayley*, J. But their right of action is only inchoate until the commission issues.] It must be admitted that *Coles* v. *Robins* (*b*) is a strong case in favour of the de-

(*a*) 2 Stark. 306. (*b*) 3 Campb. 183.

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fendant; but it would have been a case of extreme hardship if decided the other way; there the delivery of the goods to the defendant was good, because it was previous to the bankrupt's going to prison. [*Bayley*, J. But the sale by the defendant was while the bankrupt was in prison, and was made without legal authority: the goods were then the property of the assignees.] With respect to the defendant's not having notice of the act of bankruptcy, it should seem from *King* v. *Leith* (*a*) that that circumstance is immaterial; the strong and broad argument is, that the property had vested in the assignees before it was sold to the defendant, and therefore that no act of payment, with whatever good faith it was made, could divest them of their right to recover it.

ABBOTT, C. J.—This is certainly a question of very serious and extensive importance, and one which in some respects appears not to be governed by any of the decisions upon the bankrupt laws. Thus far, however, there are cases bearing upon it; that it seems to have been the common and universal understanding of Judges, that goods bought and paid for, bonâ fide, after a secret act of bankruptcy, are not the property of the assignees. The 14th section of the 1 *Jac.* 1. c. 15, provides, "that no debtor of the bankrupt be hereby endangered for the payment of his or her debt truly and bonâ fide to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt." Construing these words according to the rules of plain sense and common parlance, I think it clear that they are not confined exclusively to debts contracted *before* an act of bankruptcy committed. It is said, and very justly, that this clause must be construed with reference to that which immediately precedes it; and looking at both together, I am of opinion that the defendant, when he paid this money, was a "debtor to the bankrupt" within the meaning of the statute. If a commission had never issued, the bank-

(*a*) 2 T. R. 141.

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rupt certainly might have sued the defendant for the money as a debt; nay, he might have sued him the very next day after the goods were delivered; he had from the moment of the sale a perfect right of action against the defendant, and therefore it is impossible to say that the defendant was not his debtor. It is our duty to construe this act of parliament liberally and remedially for the public at large, which I think we should not be doing, if we were to hold this action maintainable. This act does not now apply to sales made within the city of *London*; but I cannot see any distinction between the present transaction and the case of a sale, where the money is paid down, instanter, upon the counter. I was at one period somewhat impressed by the argument respecting the 21 *Jac.* 1. c. 19. s. 14. In one sense that clause may undoubtedly apply to personal as well as real property; but "goods and chattels" in the preceding clause are mentioned in conjunction with "lands, tenements, and hereditaments," on the one side, and "other estate" on the other; and this in a statute which speaks of money lent upon lands, to be repaid at a future day. I cannot say, therefore, that the act applies to personal property in the general sense of the word; on the contrary, it seems to me that the words "goods and chattels, or other estate," must mean, not moveable chattels, but terms of years; any interest in real estate less than the fee. Our decision to-day, therefore, will not, in my judgment, at all invalidate or contravene the provisions of the 21 *Jac.* 1. c. 19. Upon the whole, I am of opinion that by the true construction of the *I Jac.* 1. c. 15, this action is not maintainable; I am warranted in that construction by the case of *Coles* v. *Robins*, and I think such a construction is the most wholesome, and most conducive to the public interests that can be adopted. The rule, therefore, for entering a verdict for the plaintiffs must be discharged.

BAYLEY, J.—I am of opinion that the payment made to the bankrupt in this case is protected by the statute,

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and that the assignees cannot maintain trover for the goods, without first tendering the price to the defendant. Generally speaking, all the property of the bankrupt becomes vested in the assignees from the date of the act of bankruptcy, and they are empowered to disaffirm every contract made by him after that date. But there are some exceptions to this general rule, and I think the present case is one. If it were not so, great injustice would follow. There must always be some interval between an act of bankruptcy and a commission; in that interval the trader, having committed a secret act of bankruptcy, may go on dealing, selling goods to his customers to a large amount, and receiving the money for them. If, in such cases, the assignees could come in and claim the goods without repaying the value of them, the grossest injustice and hardship would be the result. Nor can any mischief ensue from a different construction. It is only a sale in market overt, or in some of the ordinary and open courses of buying and selling, that is meant to be protected. Vigilantibus, non dormientibus, jura subserviunt. It is the interest, and should be made the duty of creditors to be prompt in suing out the commission; but if the law were to allow them to disaffirm such contracts as the present, it would be their interest to protract the commission as long as possible, and mark how mischievous to the world would be the situation of the trader in the interval. He would continue the visible owner of his stock and effects; he would be allowed by his creditors, and believed by the rest of mankind, to appear as such; he might sell goods, and receive the money for them; he might even sue the purchasers if they did not pay the price, and it would be no defence to them to set up his act of bankruptcy, unless the commission had actually issued. Surely then the vendee in such a case is, quodammodo at least, a debtor to the bankrupt; he is liable to be arrested at his suit; the bankrupt has all the ordinary legal remedies against him, at least then he ought to be protected by the statute. For the reasons already given by my Lord Chief Justice

I am of opinion that the protecting clause applies to debts contracted after, as well as before, the act of bankruptcy. The question then really comes to this. Was the defendant a debtor to the bankrupt, and is he endangered? He certainly was his debtor, because he might have been sued by him; he as certainly is endangered, because if the present action succeeds, he must lose both his goods and his money. If the assignees had tendered the price of the goods, a different question would have arisen; that, however, they have not done, and we are only called upon to decide whether they are entitled to recover both the goods and their value, which I am clearly of opinion they are not. The cases which have been cited for the plaintiffs, may be briefly answered thus: In *Hirst* v. *Gwynap*, the goods had not been paid for; in *Copland* v. *Stein*, the defendants were not debtors to the bankrupt, the transaction was a mere loan; and in *King* v. *Leith*, the defendant had notice of the act of bankruptcy: these, therefore, are all essentially distinct from the present case. If then there is no case to be found strictly in favor of the plaintiffs, we must act upon that which does appear directly in point for the defendant. Such a case we are referred to in *Coles* v. *Robins*; it is an authority which commands great attention and respect; it remains undisputed and unimpeached, and I confess it appears to me to have been decided upon sound, legal, and right principles. I am therefore of opinion that this action cannot be maintained, and that the verdict found for the defendant ought not to be disturbed.

HOLROYD, J.—I am entirely of the same opinion. The defendant has the strongest possible claim to the protection of the law, because in paying for these goods he has merely obeyed the law, and done that which the law would have compelled him to do. The same principle has been acted upon with reference to another statute, in the case of *Ashley* v. *Kell*(a), where it is said, "Upon motion for a new trial,

(a) 2 Stra. 1207.

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the Court held, that though under 5 *Geo.* 2. c. 30, the future effects of a bankrupt against whom two commissions had issued, were liable to be seized for the benefit of creditors; yet the bankrupt had in the mean time such a property in them, as enabled him to transact and sell to a bonâ fide purchaser." Consistently with every general principle of law and justice, it seems to me that this defendant is within the benefit of the protecting clause of the 1 *Jac.* 1. c. 15, and consequently is entitled to retain the verdict which the Jury have found in his favor.

Rule discharged (*a*).

(*a*) *Best*, J., was absent.



PAYNE and WOOD *v.* IVES, SARGON, and MANN.

Where the firm of *I.* and *Co.* gave a guaranty to *P.* and *Co.* that they would indorse any bill or bills which *S.* might give to *P.* and *Co.*, in part payment of an order for certain goods then executing for him; *P.* and *Co.* to allow 5*l.* per cent. on the amount of the bills for the guaranty; and in part payment of the goods *S.* gave *P.* and *Co.* a bill at eighteen months, which the latter kept for seventeen months and ten days, and then, finding that *S.* was insolvent, applied for the first time to *I.* and *Co.* for their indorsement, tendering the amount of commission:—Held, that *P.* and *Co.* were concluded by their laches, and that *I.* and *Co.* were not liable on their guaranty.

ASSUMPSIT upon a guaranty. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings, after last *Trinity* Term, the case was this:—The plaintiffs (who were coach-lace manufacturers), in *March*, 1821, having furnished Mr. *Stubbs* (who was in the habit of shipping goods to *India*, under the firm of *John Stubbs* and *Co.*) with lace to the amount of 837*l.*, applied to the defendants, one of whom, Mrs. *Ives*, was aunt to *Stubbs*, to guarantee the payment of that sum. To this the defendant *Mann*, on the part of his firm, consented, and the following guaranty was given to the plaintiffs, being in the hand-writing of *Mann*, and signed by him only, on behalf of the firm. "We undertake to indorse any bill or bills Mr. *John Stubbs* may give to Messrs. *Payne* and *Co.*, in part payment of an order for lace, which is now being executed for him; Messrs. *Payne* and *Co.* to allow 5*l.* per cent. on the amount of the said bills for the said

guaranty. *Ives, Sargon,* and *Mann. April* 19, 1821." The goods were delivered to *Stubbs,* who immediately shipped them for *India,* and at the same time paid the plaintiffs 500*l.* in money and wine, and in the month of *June* following, accepted a bill drawn on him by the plaintiffs, for 337*l.* at eighteen months date, which is the period of credit usually allowed in the *India* trade. The plaintiffs retained the bill, without making any application to the defendants to indorse it, for the space of seventeen months and ten days, when *Stubbs* having become insolvent, and the plaintiffs being acquainted with that fact, tendered the defendants 17*l.* the amount of the commission mentioned in the guaranty, and required them to indorse the bill. The defendants, however, declined either to accept the commission, or to indorse the bill, and after some interval, the present action was brought. Upon this evidence two objections were taken for the defendants; first, that the guaranty having been signed by one partner only, without any proof of the privity of the others, could not bind the latter, and would not support a joint action against all the partners; and for this *Duncan* v. *Lowndes* (*a*) was cited; and second, that the plaintiffs, by having kept the bill for more than seventeen months, without ever tendering the commission, or demanding the indorsement till after they knew that *Stubbs* was insolvent, had waived the benefit of the guaranty. The Chief Justice over-ruled the objections, and left it to the Jury to say, first, whether the guaranty had been given with the privity and consent of all the defendants; and second, whether in their opinion the plaintiffs had in fact discharged the defendants from their responsibility, by omitting to call upon them to indorse the bill for so long a period. The Jury found for the plaintiffs.

*Scarlett,* in *Michaelmas* Term last, obtained a rule nisi for a new trial upon the second objection only, and

*Copley,* A. G. and *Campbell* now shewed cause. The dates in this transaction are conclusive of the case. The

(*a*) 3 Campb. 478.

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bill was drawn at eighteen months, the usual credit in the trade, and therefore if the plaintiffs were not guilty of any breach of good faith (which the Jury have negatived by their verdict), they were at liberty at any moment during that period, to tender the commission and require the indorsement of the bill. The agreement was mutual, and either party might have demanded its performance by the other at any interval of the eighteen months. [*Bayley*, J. Could the defendants have called upon the plaintiffs to pay the commission? There are no words of mutuality in the agreement, and it is signed only by the defendants; how then could it be binding on the plaintiffs?] Still it was a mutual agreement, though it was signed by one party only; there was an act to be done by each party, and the verbal consent of the plaintiffs to pay the commission would have supported an action against them for it. [*Bayley*, J. Suppose the plaintiffs had then renounced the guaranty, would they then have been liable upon this agreement?] That they could not do, because it would have been against their express undertaking. If the contract had been signed by both parties, it would clearly have been mutual, and the signature of both is not always necessary, if the contract be mutual in its nature. *Solly* v. *Weiss* (a). [*Bayley*, J. That was a case of error upon the record, and therefore is very distinguishable from the present.] At least this is an executory contract, with reciprocity on both sides, with something to be done on both sides to render its execution complete. Upon what principle can it be contended that the plaintiffs were too late in the performance of their part? At what period of the eighteeen months can it be said that they ought to have tendered the commission? Certainly not on the day the bill was drawn. Then if they had an option at all, that option extended to the whole period, for it is impossible to draw the line. But this was a question of fact for the Jury, and they have found that the plaintiffs performed their part of the contract within a reasonable time, and that they were

(a) 2 J. B. Moore, 420. S. C. 8 Taunt. 371.

guilty of no fraud. The plaintiffs, therefore, have only insisted upon the strict letter of the agreement, which the Jury have determined they were entitled to do, and there seems no reason why they should be deprived of the benefit resulting to them from that determination.

*Scarlett*, *Gaselee*, and *Archbold*, contrà, were stopt by the Court.

ABBOTT, C. J.—I think there ought to be a new trial in this case, but it must be upon payment of costs by the defendants. The 5*l.* per cent. is to be allowed "for the said guaranty;" and therefore the plain meaning of the contract is, that the indorsement of the bill should be the consideration for the commission, and that until the bill was indorsed, no commission should be due. This I take to be the legal construction of the instrument, and then the question arises, whether the application for the indorsement was made in due time. Now the general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable nor convenient, for it was inflicting an injury upon the defendants by keeping them during all that time out of their commission. Besides here, the plaintiffs lie by until they learn that *Stubbs* has become insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and but for that discovery, they probably never would have applied at all. That I tnink they were not entitled to do under the agreement, and consequently that they ought not to have recovered in this action. The whole case certainly depended much upon a question of fact, and was therefore for the decision of the Jury; but I also think that the construction of the agreement is a question of law; and as the defendants chose to introduce two grounds of defence, one good and the other bad, the latter of which is now aban-

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doned, I think the Jury were somewhat misled, and that the plaintiffs are entitled to have the case re-considered on the only true ground, namely, the construction of the guaranty.

BAYLEY, J.—I entertain no doubt upon the legal construction of this guaranty. It gives the plaintiffs an option to have the indorsement or not, but it provides that they are not to pay the commission unless they do have the indorsement. It is signed by the defendants only, and therefore it is binding upon them only, for if it had been intended to have been binding on both parties, both would have signed it. Then the option given to the plaintiffs ought to have been made in reasonable time, and at any rate before that event occurred, of which, if the defendants had known, they would never have signed the guaranty. I am therefore of opinion, that the conduct of the plaintiffs has been contrary to the spirit of the agreement, and that the case ought to be submitted to the consideration of another Jury.

HOLROYD, J.—It is quite clear, that this instrument was not originally binding upon both parties, because, although it begins with the words "We undertake," it is signed by the defendants only. It has, I think, been held, that an instrument beginning "It is agreed," and signed by one of the parties only, was not binding upon the other party, until accepted by him (*a*). Now here, there never was any acceptance by the plaintiffs; they had an option to make the agreement binding by paying the commission, but they did not exercise that option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in that delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief Baron *Comyns* (*b*), that "where a condition is to do a transitory thing without limiting any time, it ought to be done imme-

(*a*) Vide 1 Saund. 291, n. 1. Id. 320, n. 4.

(*b*) Com. Dig. tit. Condition, (G. 5.)

diately, viz. in convenient time." But it cannot be said, that the tender of the commission in this case was made "in convenient time;" for on the contrary, the plaintiffs delayed acting upon the contract, until circumstances had occurred, which were dehors the contract, and which rendered it unsafe to the defendants to fulfil it. I am therefore of opinion, that the rule for a new trial ought to be made absolute.

Rule absolute, upon payment of costs (a).

(a) *Best*, J. was sitting at Nisi Prius for the Chief Justice.

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## FREEMAN v. ARKELL.

Where plaintiff declared in case against defendant for a malicious arrest, by going before a justice, and there falsely charging him with an assault, and causing the justice to grant his warrant for apprehending him, by virtue of which he was arrested and committed to prison until he found sureties, and that defendant afterwards preferred an indictment against plaintiff, which was ignored at the Sessions; and in order to prove the information and warrant upon which plaintiff was arrested, the committing justice, the deputy clerk of the peace, and the constable, were severally examined; and it appearing from the evidence of the first, that he had delivered the information to the deputy clerk of the peace or his clerk, and knew nothing more of it, and that he had granted a warrant for the apprehension of the defendant, but did not know where it was; from the evidence of the second, that he had searched for the information, but could not find it; and said that it might have been returned to the Sessions, and delivered to his clerk without his knowledge,—that it probably was not returned at all, and that if it was, it might have been destroyed when the bill was thrown out; and from the evidence of the third, that he did not know what had become of the information, but that he gave the warrant to the gaoler, who was not examined:—Held, that the plaintiff was at liberty to go into secondary evidence of the contents of the information and warrant, and such evidence having been rejected by the judge at Nisi Prius, the Court ordered a new trial without costs.

A count for maliciously indicting for an assault cannot be supported without proof of some consequential injury sustained by the plaintiff.

CASE for a malicious arrest. Declaration stated, that on, &c. at, &c. defendant falsely and without any probable cause, went before one *J. T.*, Esq. one of the Justices, &c. and there falsely, &c. charged plaintiff with having assaulted him, and taken from his person a precept from two Justices; that upon such charge defendant falsely, &c. caused and procured the said *J. T.* to grant his warrant for apprehending plaintiff, and that by virtue of that warrant, wrongfully, &c. procured plaintiff to be arrested, imprisoned, and detained until he was carried before the said *J. T.*, to be examined before him upon such charge, and because plaintiff refused

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to find sureties for his appearance at the next Quarter Sessions, defendant falsely, &c. caused and procured the said *J. T.* to grant a warrant for the commitment of plaintiff to prison by virtue of which warrant defendant falsely, &c. caused and procured plaintiff to be committed to prison, and to be detained and kept in custody for five days, until he found sureties; that at the next Quarter Sessions defendant falsely, &c. preferred an indictment against plaintiff for an assault upon defendant, which indictment was returned "not true;" concluding with an averment of plaintiff's innocence, and of damages sustained. Second count was for causing plaintiff to be arrested and imprisoned for five days, until he found sureties; third, for maliciously preferring an indictment against plaintiff, giving false evidence before the grand jury, and endeavouring to procure the indictment to be found; and, fourth, for maliciously perferring an indictment only. Plea, Not Guilty, and issue thereon. At the trial, before *Park*, J. at the last Summer Assizes for *Gloucestershire*, the committing magistrate, who had been served with a subpœna duces tecum, was called to produce the information laid before him by the defendant against the plaintiff, but was unable to do so. He stated that an information had been laid before him; that it was in writing, and that he delivered it either to the deputy clerk of the peace, or to his clerk. He also stated that he had granted a warrant for the apprehension of the plaintiff, but did not know where it was. The deputy clerk of the peace was then called, and stated that he had not been served with a subpœna duces tecum; he could not produce the information; he had searched for it, but could not find it; it might have been returned to the Sessions, and delivered to his clerk, without his knowledge, but it probably was not returned at all; the probability was, that when the bill was thrown out, the information was torn up and thrown away. The constable who served the process, was also called, but could not tell what was become of the information; he left it on the magistrate's table; he gave the warrant to the gaoler. The keeper of the county

gaol, to whom the warrant had been delivered, was called, but did not appear. Upon this state of facts it was contended, for the plaintiff, that sufficient proof had been given of the loss of the information and warrant, to entitle him to offer parol evidence of their contents: the learned Judge however was of a different opinion, and rejected the secondary evidence. Witnesses were then called, in support of the fourth count, who proved the preferring of the indictment by the plaintiff, and the fact of its being ignored, and other witnesses were tendered for the purpose of proving the absence of probable cause for the indictment; but the learned Judge being of opinion, that even if the probable cause were fully proved, still the fourth count was not sustainable, nonsuited the plaintiff, on the ground that in that count there was no averment of damage sustained by the plaintiff, nor any proof of damage to support it.

*Pearson*, in *Michaelmas* Term last, obtained a rule nisi to set aside the nonsuit, and for a new trial, upon both points; against which,

*Jervis* now shewed cause. The plaintiff has thought proper to go to trial in an unprepared state, and must suffer the consequences of his error. No sufficient ground was laid, with reference to any one of the counts of the declaration for the admission of the parol evidence. It was urged, when this rule was obtained, that if the cause had gone on, the plaintiff would have been entitled to a verdict on the fourth count, which was merely for maliciously indicting; but that is not so; for in order to sustain such a count, there must be evidence of damage sustained, either in person, in reputation, or in pocket; and there was not, nor could there be, any such evidence produced. Besides, that count was unsupported in other respects. The only proof to sustain the allegation of malice, and of want of probable cause for the indictment, was the fact that the grand jury ignored the bill, which has never yet been held sufficient;

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while on the other hand the facts of the case would have shewn that there was abundant probable cause, and that no malice existed; for the arrest arose out of an assault committed by the plaintiff, in seizing from the hands of an officer, and wrongfully detaining a summons, by which he was cited to appear before a magistrate to answer a complaint for obstructing a public footway. [*Bayley*, J. We are all of opinion that the cause ought not to have been stopped as it was. We think the committing magistrate was bound either to produce the information himself, or to enable the plaintiff to have access to it if it was in existence, or to shew what had become of it, if it was destroyed. We must therefore set aside the nonsuit, and the only point about which we doubt, is on what terms we shall do so. If we could see from the report that the magistrate had been wholly free from blame in the transaction; or, if he had now produced an affidavit, stating that he had no means of procuring the information, or of proving its non-existence, and that he had not done any thing to mislead or prejudice the plaintiff; then we should impose upon the plaintiff the condition of paying the costs.] The Court will not relieve the plaintiff from a difficulty in which he has placed himself, without imposing upon him the usual condition of paying costs, unless they are clearly of opinion that the learned Judge, in directing the nonsuit, has ruled against law. Now, upon due consideration of the evidence in the cause, it is manifest that the nonsuit was strictly consistent with the rules of law. All the special counts contained an allegation that the defendant had, by an information laid by him against the plaintiff, caused and procured the plaintiff to be arrested, imprisoned, and detained in prison. Now, that allegation was not proved; the only evidence was, that the plaintiff was imprisoned, but neither the information, nor the warrant was produced, nor did it appear how, or by whose instrumentality the imprisonment was occasioned. [*Best*, J. It appears from the report that the gaoler received the warrant.] With respect to the non-production of the

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information, there certainly was no evidence that it was lost or destroyed, and consequently there was no pretence for letting in parol testimony of the contents. On that point the learned Judge acted strictly in consonance with the rule of law upon the subject, and was perfectly justified in non-suiting the plaintiff. [*Bayley*, J. Was it not reasonable for the plaintiff to suppose that the magistrate had returned the information to the Sessions? *Best*, J. Does not the late case of *Brewster* v. *Sewell* (a) go to shew that there was sufficient evidence of the paper having been lost to let in the secondary evidence? I confess it seems to me that upon the authority of that case the parol evidence here was admissible. From the testimony of the clerk of the peace, it appears that there was such a search made after the paper, as led to a reasonable conclusion that it was no longer in existence.] His evidence upon the point did not go far enough. The paper was traced out of his possession, but it was doubtful whether it past into that of the clerk of the peace, or into that of his clerk; the clerk therefore ought to have been called to shew whether he received it, and if so, how he disposed of it. [*Best*, J. We cannot notice or recognise the deputy of a public officer, such as the deputy clerk of the peace was. It was the duty of the magistrate to return the paper to the clerk of the peace; we must presume that he did so. The clerk of the peace searches for it, and cannot find it, and we are not to go beyond the principal, and require the testimony of the deputy. When it appeared that the paper ought to have been in the clerk of the peace's custody, and was not there, the presumption was that it was lost; and then parol evidence of its contents was admissible.] At least it was a very nice question of law, and the defendant should not be prejudiced by any error into which the learned Judge may have fallen on such a point; the Court therefore will not relieve the plaintiff from the usual obligation of paying the costs as a condition for the benefit of a new trial.

(a) 3 B. & A. 296.

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*Campbell* and *Godson*, contrà, were stopped by the Court.

BAYLEY, J.—If there had been any evidence to support the fourth count, we should not have hesitated a moment in setting aside this nonsuit without costs. But the plaintiff cannot rely on that ground; for it is clear from decided cases, that to support an action for maliciously indicting, there must be proof of damage either to the person, the property, or the reputation of the plaintiff (*a*). But the recent case of *Brewster* v. *Sewell* establishes the proposition, that where a paper is functus officio, and has become useless for all purposes, except those of the cause in which it is wanted to be produced, a slighter search, and looser evidence of its loss, will suffice to let in parol testimony of its contents, than would be allowed in the instance of a document of actual value and utility. Upon this principle I think the plaintiff ought not to be burthened with the costs of the former trial, because, as it seems to me, he did all that could reasonably be expected of him to shew the non-existence of the information, and enough to permit him to give parol evidence of its contents. This document ought to have been returned to the Sessions; it was the duty of the magistrate to send it thither, and to deposit it in the hands of the clerk of the peace. The latter was examined, and stated that he had not got it; he had searched for it, and could not find it, and I think his evidence was sufficient to raise the presumption that it was lost, without calling his clerk or deputy. For these reasons, I am of opinion that the nonsuit was incorrect in point of law, and therefore that the plaintiff should be let in to have a new trial, without payment of costs.

HOLROYD, J.—I am of the same opinion. The plaintiff appears to me to have acted bonâ fide. He procures the best evidence he can, or, at least, he does all that he can, and, in my judgment, all that he was bound to do, to pro-

(*a*) Vide *Savil* v. *Roberts*, 1 Salk. 13, and the cases there cited; and *Burn* v. *Moore*, 5 Taunt. 187.

cure it. If the paper was really delivered to the clerk of the peace's clerk, which is by no means certain upon the evidence, that was in law a delivery to the master himself, and when he had proved that he had searched for it, and could not find it, parol evidence of its contents ought to have been admitted.

BEST, J.—The rule of law is, that secondary evidence shall not be admitted till all reasonable means have been tried to procure the best; and it is founded upon this very sensible reason, that it would otherwise in many cases be the interest of parties to keep back the best evidence for the mere purpose of bringing forward the secondary. But *Brewster* v. *Sewell* establishes this principle; that the degree of search necessary to infer a loss, depends upon the nature of the document in question, and is to be regulated according to its value and importance. In the present instance, the plaintiff could have no possible motive for wishing to suppress the document itself, and considering the nature of the paper, slight evidence of its loss was sufficient to let in the secondary evidence. Such evidence was given, and therefore the oral testimony ought to have been received. It may not be usual to return papers of this kind in such cases to the Sessions; I rather believe that it is not the practice to do so; in cases of felony we know, that by the 1 & 2 *P. & M.* c. 13. s. 4, and 2 & 3 *P. & M.* c. 10, they must be returned to the Assizes, but that law does not extend to cases of misdemeanor. But it rather appeared in this case that the information was returned, and if so, to whom ought it, and to whom must it be presumed, to have been returned? Undoubtedly to the deputy clerk of the peace, and he is unable to produce it. He and his clerk are, in the eye of the law, one and the same person, and a delivery to one was a delivery to the other. The evidence therefore of the loss was quite sufficient, and the plaintiff was entitled to give parol evidence of the contents.

Rule absolute for a new trial, without Costs.

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*A.* agreed in writing, that in consideration of *B.* appointing him to receive a sum of money for a lace machine (agreed for between *B.* and *C.*), he would take the machine, and pay the balance, should there be any default on the part of *C.*; and *C.* having made default: Held, on demurrer to a replication, in an action against *A.*, that the agreement was void for want of consideration.

ASSUMPSIT. The declaration stated, that whereas on 17th *October*, 1821, by a certain memorandum of agreement, made between plaintiff and one *G. Goodwin*, plaintiff agreed to sell and deliver to him a lace machine for 220*l.*; to be paid for, 40*l.* on delivery, and 1*l.* per week thereafter, until the full amount of 220*l.* was discharged, with interest, and that the said payment of 1*l.* per week should be paid to defendant, who was authorised to receive the same for plaintiff, as his trustee, and that in case of default of *Goodwin* paying defendant 1*l.* per week, *Goodwin* should forfeit the whole of the money which might then be paid, and the machine should be returned to plaintiff; and thereupon, in consideration of plaintiff appointing defendant to receive the said sum of 1*l.* per week for the said machine from *Goodwin*, defendant undertook to take the said machine, and pay the balance, should there be any default by *Goodwin* in the said weekly payment of 1*l.* to plaintiff. Averment that plaintiff delivered the said machine to *Goodwin*, who paid plaintiff 40*l.* in part payment thereof; but did not pay him the sum of 1*l.* per week, but made default therein, and 61*l.* of the weekly payments of 1*l.* were due and in arrear to plaintiff; and although plaintiff did afterwards appoint defendant to receive the said weekly sum of 1*l.* and had always been willing to permit defendant to receive the same, yet defendant did not pay to plaintiff the said sum of 61*l.*, the said weekly payments so due and in arrear, but wholly refused so to do, contrary to his said undertaking," &c. Second count similar, only averring in addition, that " plaintiff was always willing to permit defendant to take the said machine to and for his own use and benefit." Pleas, first the general issue, non assumpsit; second and third to the first and second counts respectively, " that the said supposed undertaking was a special promise by defendant to answer for the default of another person, to wit, the said *Goodwin*

and was made by defendant upon no other consideration than the appointment by plaintiff of defendant to receive the said weekly payments, to be made by the said *Goodwin* for plaintiff, as his trustee; and that no agreement in respect of the said supposed cause of action, or any memorandum or note thereof, wherein any other consideration was or is stated or shewn, was or is in writing, and signed by defendant or any other person thereunto by him lawfully authorised." Replications to both pleas respectively, "that the said undertaking was and is a promise in writing signed by defendant in the words following; that is to say, 'In consideration of Mr. *John Bates* appointing me to receive a sum of money for a machine agreed for between himself and *Gilbert Goodwin*, I hereby agree to take the machine, and pay the balance, should there be any default. *Benjamin Cort. Leicester*, 17th *November*, 1821.'" General demurrer to both replications and joinder in demurrer.

*Chitty*, in support of the demurrer. This action cannot be supported, whether considered with reference either to the common law, or the statute of frauds. It is as necessary that a sufficient consideration should be alleged in the declaration since the statute as it was before. The common law requires that there should be a sufficient consideration to support the promise, and the statute adds a still further requisite, namely, that the promise should be in writing. The fourth section of the statute enacts, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (*a*). Now this is clearly a special promise to answer for the default of another, and there is no consideration for that promise in fact; nor does any appear

(*a*) 1 Saund. 211 a. n. 2. 29 *Car.* 2. c. 3. s. 4.

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upon the face of the writing. The appointment of the defendant to receive the money as trustee for the plaintiff, is no consideration whatever; for it conferred no actual benefit upon him, nor could it work any possible loss to the plaintiff. It is not even averred in the declaration that the defendant did receive the money; but assuming that he did, still he was bound by law to pay it over to the plaintiff instanter, and therefore the receipt could produce no advantage, however small or temporary, to the defendant. The object of the contract probably was, that the defendant should have the machine in case of *Goodwin's* default; but that is not averred in the declaration, and does not appear in the agreement. By the delivery of the machine to *Goodwin*, the contract between him and the plaintiff was complete, and the defendant could never obtain the machine; for there was nothing to bind either the plaintiff or *Goodwin* to deliver it to him. The liability was all on the side of the defendant, without any obligation upon the plaintiff towards the defendant, or any consideration to him, and the defendant therefore upon these pleadings is entitled to judgment. He relied upon 1 *Rol. Abr.* 23, pl. 25; *Lingen* v. *Boughton* (a), and *Elsee* v. *Gatward* (b).

*Manning*, contrà. There is an important distinction between the first and the second count, and upon the latter the action may be supported. In that there is an averment that the plaintiff was always willing to permit the defendant to take the machine for his own use and benefit. That is a sufficient consideration for the defendant's promise to pay, because an action would lie at his suit against the plaintiff for refusing to deliver the machine. [*Bayley*, J. It is not averred that the plaintiff was under any legal obligation to deliver it to the defendant; that act is not stated as a legal result; the plaintiff should either have averred mutual promises, or that he did allow the defendant to take, and the defendant agreed that he would take the machine. It is not

(a) 3 Buls. 206. (b) 5 T. R. 143.

even averred that the plaintiff offered to deliver it to the defendant. The allegation that the plaintiff was willing to permit the defendant to take it depends upon *Goodwin's* paying the money, and leaves to the defendant the burthen of suing *Goodwin* for the machine. In fact it is no part of the consideration.] The consideration is, that the defendant shall have the machine, and that is sufficient to support the action. [*Holroyd*, J. There is nothing to shew that the plaintiff was bound to give him the machine, and therefore it is no consideration at all.]

BAYLEY, J.—This case is too plain for argument. The second count, though somewhat varied, is equally defective with the first. It gives the plaintiff no right to retake the machine from *Goodwin*, and does not put him in a situation to give it to the defendant. The first count is most clearly bad upon the authorities cited for the defendant, and the second is a mere sale out and out from the plaintiff to *Goodwin*. The defendant therefore is entitled to judgment on demurrer.

HOLROYD and BEST, J.'s, concurred.

Judgment for the defendant.

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FORBES *v.* Sir A. J. COCHRANE, Knt. and Sir G. COCKBURN, Knt.

Where negroes in a state of slavery, in a colony of *Spain*, escaped from their master's plantation, and took refuge, and were received on board a *British* vessel of war, whilst she was stationed at an island captured by his majesty's arms from the United States in time of war; and after notice given to the officers commanding on the station, that they were run-away slaves, the officers carried them to, and left them at, a *British* colony:—Held, that case would not lie in this country against the officers for harbouring and detaining such negroes, even though by the lex loci, whence they escaped, slavery was permitted.

CASE for enticing, harbouring, and detaining certain slaves of the plaintiff. Plea, Not guilty, and issue thereon.

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At the trial, before *Abbott*, C. J., at the London adjourned Sittings after *Trinity* Term, 1822, a verdict was found for the plaintiff, damages 3,800*l.*, subject to the opinion of the Court upon the following case:—

The plaintiff was a *British* merchant in the *Spanish* provinces of *East* and *West Florida*, where he had carried on trade for a great many years, and was principally resident at *Pensacola*, in *West Florida*. *East* and *West Florida* were part of the dominions of the King of *Spain*, and *Spain* was in amity with *Great Britain*. The plaintiff, before and at the time of the alleged grievances, was the proprietor, and in the possession of a cotton plantation, called *San Pablo*, lying contiguous to the river *St. John's*, in the province of *East Florida*, and of about 100 negro slaves, whom he had purchased, and who were employed by him upon such plantation. The river *St. John's* is about thirty or forty miles from the confines of *Georgia*, one of the United States of *America*, which is separated from *East Florida* by the river *St. Mary*, and *Cumberland* Island is at the mouth of the said river *St. Mary*, on the side next *Georgia*, and forms part of that state. During the late war between *Great Britain* and *America*, in the month of *February*, 1815, the defendant, Vice-Admiral Sir *A. J. Cochrane*, was commander-in-chief of his Majesty's ships and vessels upon the *North American* station. The other defendant, Rear-Admiral Sir *G. Cockburn*, was the second in command upon the said station, and his flag-ship was the *Albion*. The *British* forces had taken possession of *Cumberland* Island, and at that time occupied and garrisoned the same. The *Albion*, *Terror* bomb, and others of his Majesty's ships of war, formed a squadron under Sir *G. Cockburn*'s immediate command off that island, where the head-quarters of the expedition were. Sir *A. J. Cochrane* was not off *Georgia* during the war, and at the time of the capture of the island he was at a very considerable distance to the southward; but Sir *G. Cockburn* was in correspondence with him while he was at the said island. In the year 1814, a pro-

clamation had been published by Sir *A. J. Cochrane* as such commander-in-chief, and Sir *G. Cockburn* had received great numbers of copies thereof while the ships under his command were lying off the *Chesapeake*, and distributed them at the *Chesapeake*, and among the different ships; but none were distributed by his order to the southward of the *Chesapeake*, the southern extremity of which is full 400 miles distant from *Cumberland* Island. The following is a copy of the proclamation:—"Whereas it has been represented to me that many persons now resident in the United States have expressed a desire to withdraw therefrom with a view of entering into his Majesty's service, or of being received as free settlers into some of his Majesty's colonies, This is therefore to give notice, that all those who may be disposed to emigrate from the United States will, with their families, be received on board his Majesty's ships or vessels of war, or at the military posts that may be established upon or near the coasts of the United States, when they will have their choice of either entering into his Majesty's sea or land forces, or of being sent as free settlers to the *British* possessions in *North America*, or the *West Indies*, where they will meet with all due encouragement." One of these proclamations was seen on *Amelia* Island, *East Florida*, which is less than a mile from *Cumberland* Island, and about thirty miles from *San Pablo* plantation. In the night of the 23d *February*, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the *Terror* bomb, part of the squadron at *Cumberland* Island, and entered on her muster books as refugees from *St. John's*. It was reported that they came from sea-ward; they were mixed with other refugees, and they all spoke *English*. On the 26th of the same month, Sir *G. Cockburn* received from the plaintiff a letter or memorial, demanding restitution of his slaves, to which a written answer was sent. A correspondence also took place between the *Spanish* Governor of *East Florida* and Sir *G. Cockburn*, relative to the desertion of slaves from

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the *Spanish* settlements. This correspondence was previous to the plaintiff's letter or memorial, and after it the plaintiff had an interview with Sir *G. Cockburn,* and claimed of him the slaves in question, then on board the *Terror* bomb, as his property. Sir *G. Cockburn* told him he might see his slaves, and use any arguments and persuasions he chose, to induce them to return. The plaintiff accordingly endeavoured to persuade them to go back to his plantation, and no restraint was put upon them; but they refused to go. The plaintiff then urged his claim very strongly to Sir *G. Cockburn,* and said, he must get redress if he did not succeed in prevailing upon him to order them back again, which Sir *G. Cockburn* said he could not do, because they were free agents, and might do as they pleased; and that he could not force them back. They were victualled and subsisted with Sir *G. Cockburn's* knowledge, while on board the *Terror* bomb, and on the 6th *March,* were removed from that ship, by his orders, into his own ship, the *Albion.* On the 9th *March,* 1815, Sir *A. J. Cochrane* addressed to Sir *G. Cockburn,* the following letter:—"*Tonnant,* off *St. Mary's,* 9th *March,* 1815, No. 41, to Rear-Admiral *Cockburn.*—Sir. Having received and considered your letter, No. 25, of the 28th *February,* 1815, and the correspondence it incloses, respecting some individuals of color who have arrived at *Cumberland* Island, and there placed themselves under the protection of his Majesty, and who have been since represented as having escaped from his Catholic Majesty's possessions in *East Florida,* where it is said they were slaves, and in consequence have been formally demanded by the governor and other claimants of *East Florida*; I have the honor to inform you, that under the circumstances attending these people, I do not consider myself authorised (without reference to his Majesty's government) to decide upon the claims set forth by the governor and other persons in *East Florida*; and as without such reference it will be impossible for me to attend to any solicitation of their being given up, you will be pleased to

cause the refugees in question to be put on board one of his Majesty's ships going to *Bermuda*, to be reported to me on their arrival there, and I will take care to have them so guarded, as to prevent their desertion, and to be forthcoming, should it be decided that they are to be returned to *East Florida*. With regard to the latter part of your letter, requiring instructions relative to any slaves who may hereafter in like manner seek protection, I am to acquaint you, that I cannot authorise their being received into any of his Majesty's ships. *A. J. Cochrane*." In the same month of *March*, Sir *G. Cockburn* sailed in the *Albion*, with the said slaves on board, for *Bermuda*, at which time he had received intelligence of peace between this country and *America*, and such slaves as belonged to *American* subjects, and were in the possession of the defendants, were not taken away, in consequence of the wording of the treaty of peace. *Bermuda* is a *British* colony, five hundred miles from *East Florida*, or any other land where slavery is acknowledged. The slaves in question were, on the 29th *March*, 1815, transferred, by Sir *G. Cockburn*'s orders, from his Majesty's ship the *Albion* into his Majesty's ship the *Ruby*, at *Bermuda*, and after being on board that ship about twelve months, were landed in that island, and many of them employed in the King's dock-yard there. The slaves which were taken on board the *Albion*, and belonging to the plaintiff, were worth to him 3800*l*. The question for the opinion of the Court is, whether the plaintiff is entitled to maintain this action against both, or either of the defendants. If the Court should be opinion that he is, then the verdict is to stand against one, or both of the defendants, as the Court shall direct; but if not, then it is to be entered for the defendants, with liberty for either party to turn this case into a special verdict, with all proper formalities, if the Court shall think fit.

*Comyn*, for the plaintiff. This action is maintainable. The plaintiff was a *British* subject resident in a neutral

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state, and therefore entitled to the same protection as if he had been a native of the country in which he resided. Although the slave trade has, by the statutes 47 *Geo.* 3. c. 36. and 51 *Geo.* 3. c. 23, been abolished by *Great Britain*, and is, in a *British* Court of Justice, primâ facie to be considered as contrary to law, still *British* Courts will respect even that trade as carried on by other nations who have not abolished it. This proposition is supported by the judgment of Lord *Stowell* in the case of the *Fortuna* (a), where that learned Judge, after noticing the judgment which had previously been pronounced by Sir *W. Grant*, in the Cockpit, says, "The slave trade has since been totally abolished in this country, and our legislature have pronounced it to be contrary to the principles of justice and humanity. Whatever we might think, as individuals before, we could not, sitting as Judges in a *British* Court of Justice, regard the trade in that light, while our own laws permitted it. But we can now assert, that this trade cannot, abstractedly speaking, have a legitimate existence. When I say 'abstractedly speaking,' I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit its own subjects to prosecute this trade." That was an appeal from the Vice-Admiralty Court of *Tortola*, in which the vessel and cargo had been condemned to the captors. The ship belonged to a subject of *Spain*, and upon hearing the appeal, the ship was restored to the owner, although it was undoubtedly employed, at the time of the capture, in carrying slaves from the coast of *Africa* to a *Spanish* colony. [*Bayley*, J. But it was the vessel only that was restored. It may make a great deal of difference whether a Vice-Admiralty Court will sanction the seizure of a foreign vessel engaged in that trade, or whether *British* Courts of Justice will be active in entertaining suits relating to the emancipation of men from slavery. *Best*, J. That was an appeal from a colonial judgment. The appellant jurisdiction must act upon the colonial

(a) Dodson's Adm. Rep. 95.

law, and can only consider whether the jurisdiction of the Court below has been exercised according to the law of the place. How will that case then apply to us here? We are to decide according to the law of the *British* empire.] That was a *British* settlement. [*Best*, J. And one in which the law of slavery prevailed.] The colonial Courts do not act, independently, upon the lex loci, but upon the laws which they receive from the mother country; otherwise, they would have no power to act at all. [*Best*, J. If that were the case, any person might sue out a writ of habeas corpus here, and thus set at liberty all the slaves in *Jamaica*, or elsewhere.] Lord *Stowell's* judgment is framed in the most cautious manner, and seems studiously intended to distinguish the rights of foreign nations, and the respect to be paid to those rights in our Courts, when they appeal here for restitution, or damages for the violation of their property. This is to be collected from his observations in the cases of the *Admedie* and the *Diana* (a). [*Bayley*, J. There is a difficulty in applying those cases to the one before us. Whether these slaves were obtained by the plaintiff through the medium of the slave trade, does not appear from any part of the case, and still slavery may subsist in that place. They may have been obtained by other means, as by being born slaves. When a country has abolished the slave trade, there can be no property in slaves obtained through the medium of that trade after that period, but that would not destroy the right of the master to those persons who were born in a state of slavery. *Best*, J. It appears to me that those cases can have no reference to the present, placed in the situation in which we are, and called upon to administer *English* law. The case last alluded to was that of a *Swedish* ship condemned at *Sierra Leone*, by the Vice-Admiralty Court there. Lord *Stowell* says, in effect, "*Sweden* thinks proper to allow her subjects to carry on this trade. We cannot interfere with the merchants of *Sweden* upon the

(a) Dodson's Adm. Rep. 95.

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high seas, and say, "You shall not carry it on." Therefore the Court at *Sierra Leone* have done wrong in condemning this ship. They have condemned it as belonging to a nation which has consented to the abolition of the slave trade; whereas it has not done so." *Bayley*, J. Lord *Stowell*, as Judge of the High Court of Admiralty, in *England*, stands in the situation of middle man between this and all other countries, and the question before him there was, whether he would lend himself, or whether any officer under his jurisdiction should be permitted to lend himself, to take away from foreign subjects foreign property. His decision is nothing more than this—"I am not to be active in taking away foreign property from foreign nations." Whether the municipal Courts of this kingdom will give a remedy, if the property is taken away, is another question. The Vice Admiralty Courts may be considered as the hands of the High Court of Admiralty in this kingdom, which says, "None of my hands shall do so great a wrong as to take away from a foreign subject that which this Court ought not to take away."] The principle upon which the Admiralty Court ruled in the cases cited, has been recognised by this Court in *Madraza* v. *Willes* (a), which is a strong authority in support of this action. [*Holroyd*, J. In that case the plaintiff was a *Spanish* subject, lawfully possessed of, and entitled to the slaves, and the defendant, who was a *British* subject, actually, and by force, took them out of his possession. That is a very different case from the present. *Best*, J. It is distinguishable in this respect, that there the individuals sued for were slaves at the time of the act done; but if *Somerset's* case (b) is law, these individuals had redeemed themselves from slavery by the act of escaping.] The whole merits of the case may be said to depend upon that question, whether they were or were not slaves at the time of their reception and detention by the defendants. [*Best*, J. I should be glad to know whether, if Sir *George Cockburn* had forced these

(a) 3 B. & A. 353. (b) Lofft. 1. Ho. St. Tr. vol. xx. p. 1. S. C.

people to return to slavery, he would not have been liable to an action in the Courts of this country for so doing. Lord *Mansfield*, in *Somerset's* case (*a*), refers to that of *Smith* v. *Brown* (*b*), as a decision upon the point, though I rather believe the latter was never, properly speaking, decided. But he says, "But here the person of the slave himself is immediately the object of inquiry, which makes a very material difference."] The case last alluded to exemplifies and confirms the distinction now contended for, and is applicable to the present in that respect, and no farther. In all the cases cited, the parties seeking compensation were, at the time of the alleged injury, in the actual prosecution of the slave trade; but the present plaintiff was not so; the slaves had belonged to him for many years. This distinction was recognised in *Somerset's* case, where it was admitted that the question was one, not of the slave trade, but of slavery, and that it was contrary to the principles of the law of *England*, that slavery should exist there, except in the old case of villeinage. [*Best*, J. A villein was not a slave.] Certainly not, except in those cases in the old law where they were held in vassalage, and there it would be difficult to distinguish between the two appellations. It must be admitted, therefore, that slavery, excepting that species of it just alluded to, and which is now happily obsolete, cannot exist in this country. Mr. *Hargrave*, in this very case, cites a determination of Lord Chancellor *Northington*, in *Shanley* v. *Hervey* (*c*), in which that is laid down as the broad principle upon which all the other Judges had acted, and where he said, "As soon as a man puts foot on *English* ground, he is free; a negro may maintain an action against his master for ill usage, and may have a habeas corpus if restrained of his liberty." The distinction, therefore, is this, that as slavery cannot exist in this country, the party cannot have any remedy, either to recover possession of the person who may be the subject of inquiry,

(*a*) Lofft. 1. Ho. St. Tr. vol. xx. p. 1. S. C.

(*b*) 2 Salk. 666.

(*c*) Chancery, E. T. 1762.

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and who may be a slave in another country, though not in this, nor for the injury done him by the infringement of his interest in that person; but in respect of such property in another country, where slavery may exist, he has a remedy in the courts of this country. [*Best*, J. Is there any where to be found more than one solitary case in which damages were ever recovered for a negro slave, *Butts* v. *Penny* (*a*), and in that case, are not slaves put upon the same level as monkies are in another case of *Chrymes* v. *Shack*? (*b*) Can we receive such a case as that, as a legal authority now? The cases cited by Mr. *Hargrave* were never decided.] It is clear, even in this country, so far as the trade of slavery is concerned and recognised with regard to the *British* colonial settlements, as well as the plantations themselves, that an action will lie, either for the recovery of the plantation itself, or of the slaves upon it. An action may be brought here upon a contract for the price of slaves upon a plantation in any of the *West India* Islands; they are constantly conveyed by deed in this country, and they pass as property by deed and delivery. The price may be recovered in the Courts here, because the law does not say that the exercise of slavery in the *British* settlements is illegal, but that no *British* subject shall engage in the traffic of the slave trade; so that slavery is not denied to exist by the laws of *England*. Indeed, if the *West India* planters were not protected in the exercise and enjoyment of that species of property, and entitled to recover in this country, either for the price, or for an injury done thereto, they would be placed in a very disadvantageous and alarming situation. Upon this point the case referred to by the Court, of *Butts* v. *Penny*, is worthy observation. [*Best*, J. That case was never decided. All that it affords is the mere extra-judicial dictum of a Judge. It appears that the roll was only marked with the words "ulterius consilium." But, independently of that, it has been more than once over-ruled

(*a*) 2 Lev. 201. 3 Keble, 785. S. C. (*b*) Cro. Jac. 262. Hargr. Tracts, 39. S. C.

in subsequent cases.] It is not cited as a direct authority upon which the Court can act, but to shew the distinction between slavery in *England*, and slavery in the *West Indies*. It is inconsistent with the law, that a man should be in a state of slavery here, but it is not inconsistent with the municipal laws of the colonies that he should be a slave there. *Somerset's* case, therefore, is distinct from the present, and does not affect it. [*Best*, J. The only distinction is this, that there the negro had been brought to *England* by his master; here the negroes had only set their feet upon the deck of an *English* man of war; is there any substantial difference? Are not the rights obtained by these people by going on board an *English* vessel, the same as if they had actually landed on *English* ground?] There is a great difference between manumission in this country and in others. That is particularly observed in *Keene* v. *Baycott* (*a*), and indeed, if no such difference existed, the *British* colonies could not possibly be protected or maintained. If the position last suggested by the Court can be supported, then if a ship be taken on the high seas with slaves on board, as in the case of *Madraza* v. *Willes* (*b*), the moment the slaves set their foot upon the deck of the captor's vessel, they are redeemed, and become free men. But no such result can follow, because the act of seizing the ship, and of transferring the slaves from it, is a tortious and illegal act. If manumission could be thus effected, the colonies must instantly be ruined, because all the slaves would desert as speedily as possible, would be received on board of *English* vessels, and would so become free men. [*Bayley*, J. *Keene* v. *Baycott* was the case of a person, being a slave, entering into a contract as if he had been a free man, to serve in this country for a limited space of time; and therefore does not bear upon the present case.] It is not quoted as an authority in point, but as an answer to the suggestion that the moment a slave treads the deck of a *British* vessel he becomes free. [*Best*, J. I did not quite go that

(*a*) 2 H. Bl. 515.

(*b*) 3 B. & A. 353.

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length, nor is it necessary to do so. Suppose the ship in this case to have been in the waters of *Florida*, then a slave on board her would have been in the same situation as if on the land, and all the laws of *Florida* would attach both to the ship and to the slave; but when the ship is on the high seas, or off *Cumberland* Island, she is in effect in *England*, at least she is not in *Florida*, and all the laws of *England* attach to her, and to all that are on board of her.—*Bayley*, J. The plaintiff cannot support any of the counts in this declaration, except that for harbouring the slaves. Now, in order to support that count, it must appear that the defendants harboured them, knowing them to be the plaintiff's slaves; but all that the case finds is, that the plaintiff told the defendants that the slaves were his; is that sufficient? Must they not know the fact of their own knowledge in order to render them liable under this count?] Upon the authority of *Blake* v. *Lanyon* (*a*), which is directly in point, the knowledge of the defendants here, is sufficient to sustain the second and third counts. There it was held, that an action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know when he employed him that he was the servant of another. The case of *Smith* v. *Gould* (*b*), does not affect the principle upon which this action may be maintained. That was an action of trover for several articles of property, and among the rest a negro. There was a verdict for the plaintiff, with separate damages for each, including 30*l*. for the negro; and after argument on a motion in arrest of judgment, the Court held that trover did not lie for a negro. Mr. *Hargrave*, in his argument on *Somerset's* case, adverts to this decision, and says, "If in this case the action was for a negro in *England*, the judgment in it is a direct contradiction to the case of *Gelly* v. *Cleve* (*c*). But I am inclined to think that in this, as well as in the former cases

(*a*) 6 T. R. 221.
(*b*) 2 Salk. 666. 2 Ld. Raym. 1274. S. C.
(*c*) 1 Ld. Raym. 147.

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of trover, the negroes for which the actions were brought, were not in *England*, and that in all of them the question was, not on the lawfulness of having negro slaves in *England*, but merely whether trover was the proper form of action for recovering the value of a negro unlawfully detained from the owner in *America* or *India*. The things for which trover in general lies are those in which the owner has an absolute property, without limitation in the use of them, whereas the master's power over the slave doth not extend to his life, and consequently the master's property in the slave is in some degree qualified and limited. Supposing therefore the cases of trover to have been determined on this distinction, I will not insist upon any present benefit from them in argument, though the last of them, if it will bear any material inference, is certainly an authority against slavery in *England*." There is a main distinction between that case and all the law to be met with on the subject of slaves, namely, whether the property was taken in *England*, or in a part of the globe where slavery exists, and is allowed by law. If this be a sound distinction, there seems to be no answer to the present action, because as neutral states, and neutral subjects, and *British* subjects resident in neutral states, have all a right to have their property respected by Belligerent Powers; this plaintiff is entitled to come into a *British* court of justice, and claim redress for an injury done to property of any kind, in respect of which an action may be maintained at all. If the property thus detained had been of any other kind and nature, there is no doubt that this action would have been maintainable; and why are not slaves to be protected as property here, being legal property in the place where they were detained? If such an action as the present is maintainable in respect of a servant, or an apprentice, which it is; why should it not lie for a slave? An apprentice is quodammodo a slave. [*Best*, J. That I, for one, can never be brought to admit: I cannot imagine any two things more widely or essentially distinct.] The apprentice surrenders himself to the will and pleasure of his

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master for a limited time; the slave is disposable according to the will and pleasure of his master, for life; that is all the difference between them; but between an injury done to property in slaves belonging to a neutral subject, and to the same kind of property belonging to the subject of a state by whose laws slavery is allowed, the difference seems to be none.

*Jervis*, contrà. The plaintiff cannot recover against either of the defendants, although their cases are in some important particulars very distinct from each other. That distinction however it is not necessary to enforce, because, while the separate defence of each defendant may be rested upon the particular facts applicable to them respectively, they have a joint and common answer to this action upon the general principles of *English* law. It being conceded, that there is no ground for charging either of the defendants with enticing away the plaintiff's slaves, the result is, that all that was done by them individually and collectively was perfectly legal. They addressed a proclamation to the inhabitants of *America*, with which country *Great Britain* was then at war, inviting them to desert, and to enter into his Majesty's service. That proclamation was so addressed to them for the purpose of weakening the forces of the enemy, and adding to the strength of those engaged in war against them. But it was not addressed to the slave population; it was dated at a distance of 400 miles from the place where the desertion of these slaves took place; but a copy of it was seen upon *Amelia* Island, whether by these slaves, or not, does not appear, but certainly within a mile of the plaintiff's plantation. Whether it was in consequence of seeing this proclamation, that these unfortunate persons fled from their master, and sought a refuge on board a *British* man of war, does not with certainty appear; but it is clear that they came thither without the knowledge or cooperation of either of the defendants. Having arrived, they are received on board the fleet, and entered as refugees from

*St. John's*; their own account being that they had come from sea-ward. Where precisely *St. John's* is situated the case does not find; but it may be admitted that it is in *East Florida*, where the plaintiff's plantation lies, and that these slaves did come either from the river, or the banks of the river *St. John's*, in *East Florida*. It is also found by the case, that they all spoke *English*, though undoubtedly that constitutes rather a fact for the Jury, than an argument to the Court. What is it the plaintiff, in his interview with Sir *G. Cockburn*, after he had presented a memorial, required to be done? He claims the slaves as his property; it is a mere naked claim. He is told that he may see the slaves, and use any arguments and persuasions he chuses, to induce them to return. That was a perfectly legal and proper course for Sir *G. Cockburn* to pursue, and was all that he could have been justified in doing, or suffering to be done. The plaintiff does see them, and does endeavour to persuade them to return, but, as might be expected, without success. It is material to observe that the plaintiff did not come prepared with any means of carrying back the slaves, which he ought to have done, and which it must be assumed he neglected to do, because the case does not find the fact. The slaves refuse to return; had they a right to refuse? Undoubtedly they had. The plaintiff then applies to Sir *G. Cockburn* to compel them to return. He refuses to do so, saying, "that they were free agents, and might do as they pleased; he could not force them back." Was this the proper answer, and was he justified in his refusal? Would he have been justified in complying with the request? Clearly not. He had no power to enforce the return of these men to slavery; he had no authority to furnish them with the means of returning, even if they had been willing to go; he had no right to lay a finger upon any one of them to remove him; such an act would have been an assault, for which he would have been answerable in a Court of law. Then, what was he to do with them? Could he throw them

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overboard, to perish in the waves? For to that length the argument on the other side must go, if it is to be entertained at all. But not to reason further upon the facts, the present case has been decided in point of law by that of *Somerset* the negro (a). Many of the propositions advanced on the other side may be admitted without in the least affecting the real question before the Court. It may be admitted that a *British* subject may possess a plantation in one of the *British* colonies, and have a legal property in slaves there; or that he may possess a plantation in *Spanish America*, where slavery is tolerated by law, and have a legal property in slaves there. What are the principles resulting from the numerous cases quoted on the part of the plaintiff? The first class of cases consists of those in the Admiralty Court; the *Fortuna*, the *Donna Marianna*, the *Diana*, and the *Admedie*. What is the principle to be extracted from these? That the courts of this country will respect the property of foreigners engaged in the slave trade, where that trade is tolerated by the laws of their own country: that is the result of all those decisions, and that only, and such it is described and laid down to be, by Mr. Justice *Best*, in his elaborate judgment in the case of *Madraza* v. *Willes* (b), in which all those cases were minutely investigated and considered. But that last case is no authority to govern the present; they are perfectly distinguishable, and in this very important particular; here the slaves had deserted from their master without the knowledge of the party in whose possession they were subsequently found; there an act of positive aggression was committed by a *British* upon a *Spanish* subject, who was lawfully employed under the sanction of his own government in the prosecution of the slave trade; and upon that ground the Court were of opinion that the action was maintainable. If the vessel, in which these slaves sought refuge, had been at that time locally situated within the limits of the state of *East Florida*, the case might have

(a) Lofft. 1. Ho. St. Tr. vol. xx. p. i. (b) 3 B. & A. 353.

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stood somewhat on a different footing; but the fact is not so; she was either, in the general sense of the word, at sea, or upon the high seas; or she was within the waters of an island recently captured from *America*; and therefore she was, to all intents and purposes, the same as the *British* soil; for she was within the jurisdiction of *Great Britain*, and within the operation of her laws. The great and comprehensive argument therefore is, that the moment these refugees had set foot upon the deck of a *British* vessel, so circumstanced and so protected, they had acquired all the rights and privileges attaching to the shores of *Great Britain* itself; they were redeemed from slavery, and had become free men; they were from that instant jurum suorum, and were entitled to all the remedies afforded by the laws of *England*, for any act of injury or of constraint that might have been inflicted on them. The next class of cases quoted on the other side, are those cited by Mr. *Hargrave*, in his argument in that of *Somerset* the negro. Some observations made by Lord *Mansfield* in that case will establish this position, that if a slave escapes from any place where slavery is lawful, and sets his foot upon a soil where slavery is prohibited, he is from that moment free. His Lordship was indeed at one time alarmed at the very extensive consequences of such a proposition; for he says, "might not a slave as well be freed by going out of *Virginia* to the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient?" His Lordship, however, eventually brought his mind to the conclusion adopted by the rest of the Court. [*Bayley*, J. In that case the slave was brought into *England* by his master, with his own consent.] That was the fact, and that constitutes the distinction between that case and the present; the slave had come into this country willingly, and having refused to return, or to obey his master's commands, he had carried him to be put on board a vessel for the purpose of removing him to sell him as a slave; and, under those circumstances, a

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writ of habeas corpus was moved for and obtained. Lord *Mansfield* also alludes to this circumstance; for, in another part of the case, he says, "The question is, if the owner had a right to detain the slave for the sending of him over to be sold in *Jamaica*? In five or six cases of this nature I have known it to be accommodated between the parties; on its first coming before me I strongly recommended it here: but if the parties will have it decided, we must give our opinion. Compassion will not on the one hand, nor inconvenience on the other, be to decide, but the law; in which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to agreement. But here the person of the slave himself is immediately the object of inquiry, which makes a very material difference. The now question is, whether any dominion, authority, or coercion, can be exercised in this country on a slave, according to the *American* laws. The difficulty of adopting the relation without adopting it in all its consequences is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of *England*. We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: it is now about fifty years since the opinion given by two of the greatest men of their own, or any times (since which no contract has been brought to trial between the masters and slaves); the service performed by the slaves without wages is a clear indication they did not think themselves free by coming hither." His Lordship then goes on to speak of the very extensive consequences the decision of that case involved. The case of *Smith* v. *Brown* (*a*) has been alluded to in substance, though not by name, because it has been said, that an action may be maintained here for the price of a slave. That proposition however is much too large, and is not sup-

(*a*) 2 Salk. 666.

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ported by that case, which was never decided; the judgment there was arrested on the ground that the declaration should have averred (what it did not aver) that the negro, at the time of the sale, was at *Virginia*; and that negroes, by the laws of *Virginia*, were saleable as goods and chattels. [*Best*, J. It appeared by the declaration, as originally framed, that the transaction took place in *England*; the Court said they could not discuss that here, and leave was given to amend; but it does not appear that any amendment was ever made, or that the question was ever decided.] The cases remaining to be noticed are *Butts* v. *Penny* (*a*), and *Smith* v. *Gould* (*b*); of which it is also sufficient to say, that they are not decisions, and cannot be treated as authorities. [*Holroyd*, J. The present declaration appears upon the face of it to be founded not upon any law of the *Spanish* colonies, but upon the general right.] Undoubtedly that is so; nor is it found by the case, as it ought to have been most distinctly, that slavery is recognized by the municipal laws of *Spanish America*. [*Best*, J. The law sanctioning slavery is now a local law, and the plaintiff therefore was bound to shew that it prevailed upon the spot where this transaction occurred.] The main argument on the part of the defendants is, that slavery is not a natural, but a municipal relation; an institution which is confined to certain places, and is necessarily dropped by the passage of the slave into a country where no such municipal relation exists. [*Holroyd*, J. Lord *Holt*, in *Smith* v. *Brown* (*c*), seems to have considered, that in an action brought in *England* for the price of a slave sold in *Virginia*, the contract being made in *England*, but the slave being actually in *Virginia*, where by the municipal law the relation of master and slave might exist, it was necessary to shew that slavery was lawful in the place where the sale took place, and that such an averment must be introduced into the declaration. Now, if that be so, his observation goes, not only as an

(*a*) 2 Lev. 201. 3 Keble, 785. S. C.

(*b*) 2 Salk. 666.

(*c*) 2 Ld. Raym. 1274. S. C.

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objection to the form of this declaration, but also raises a question as to the extent of operation attributable to the municipal law of any particular place. It seems to me that the municipal right can exist only while both the parties are resident in the place where it is recognized; and that where the master brings the slave, or the slave escapes, to a place, where no such right is recognized, there no action can be maintained by the master to recover the possession of him, because as the slave is under no obligation to return, it is no illegal act in any third person to harbour him, or to prevent him from returning.] The argument for the defendants is certainly intended to be carried to that length. The right of the master goes to this extent, and no further, that he may maintain an action here for the seizure or detention of his slave within the limits of a country, by the municipal laws of which slavery is recognized. That was the case in *Madraza* v. *Willes* (a), and upon that ground the action there was held to be maintainable; but that is not the case here; for here the slaves had, by entering on board an *English* ship, lying off an *English* port, ceased to be slaves; they had shaken off that odious and degrading condition by escaping from the limits of the state by the laws of which it was imposed upon them, and had become free men. Let the present case be tried by the test already suggested by the Court: Could Sir *G. Cockburn* legally have used force to turn these individuals out of his ship, and to compel them to return to the plaintiff's plantation? If he had done so, would not any one of them who could afterwards reach any place where a *British* court of justice was to be found, have been entitled to maintain an action against him? [*Best*, J. Suppose, in the attempt to remove any one of them by the act, or the orders of the defendants, a scuffle had ensued, which had ended in his death, would they not have been guilty of murder?] Most certainly they would. It has been well said, that freedom is a natural right, unalienable and unrestrainable; that right these individuals had re-ac-

(a) 3 B. & A. 353.

quired when they had planted their foot upon the deck of a *British* man of war; and if any act of violence had been offered to their persons there, being as they were, as well by the laws of nature as by those of *Great Britain* free, and death had ensued, the person who had caused that death would have been guilty of murder. Look at the consequences which the proposition contended for on the other side would lead to. If Sir *G. Cockburn* had exercised any force or restraint upon these individuals, slavery would have existed in the very last place in which it can, or ought to exist, on board a *British* man of war, the bulwark of *British* liberty. What would become of the discipline of the *British* navy, if slavery were to be tolerated there? What would become of the spirit of *British* seamen, if they were to be made the witnesses of acts of oppression committed upon the persons of their fellow-subjects? If it is terrible to the feelings and apprehension of *Englishmen* that slavery should exist in their own country, and on their own soil, it must be equally intolerable to them that it should exist on board their ships of war, every one of which is part and parcel of the soil of *England*, governed by the same laws, and protected by the same rights. The case of *Keene* v. *Baycott* (*a*), which has also been cited, has no analogy whatever to the present. It must be conceded on the authority of *Blake* v. *Lanyon* (*b*), that in order to sustain this action it is not necessary to affect the defendants with previous knowledge; it is certainly sufficient if they have harboured the plaintiff's slaves after notice that they were his, without personal knowledge of the fact. Admitting also, what is not expressly found by the case, that slavery is recognized by the municipal law of *East Florida*, still, as these individuals were not enticed by the defendants, but came to them voluntarily as refugees, and were received as refugees, and not as slaves, it may be safely contended that neither of the defendants has committed any act for which he is liable to answer in the present action. [*Bay-*

(*a*) 2 H. Bl. 513. (*b*) 6 T. R. 221.

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*ley*, J. How could the defendants know that these individuals belonged to the plaintiff? Were they bound to make inquiries, and satisfy themselves upon that subject? Was Sir *G. Cockburn* himself to travel forty miles to ascertain the fact, or whom was he to send upon such a commission? It seems to me that his duty, as the commander of a man of war, equally precluded him from undertaking such a work himself, and from employing any of his crew upon it.] That is indeed a very strong and material argument. The plaintiff's memorial averred that the refugees were his slaves, but there was no other evidence of the fact, except as it appears to be assumed by Sir *A. J. Cochrane's* letter to Sir *G. Cockburn*. [*Best*, J. I think that letter puts the case upon the only proper ground. Sir *A. J. Cochrane* says, "these people are come to receive protection from us, and we cannot send them back again without the authority of government."] The defendants therefore have acted throughout bonâ fide, and there are many cases to shew that persons in an official capacity, acting bonâ fide, are not responsible for the consequences of their acts. *Sutton* v. *Johnstone* (*a*), and the cases there cited. [*Bayley*, J. There is an essential difference between acting malâ fide, and perhaps in substance saying, "I will not use force; these persons are on board my ship; you may persuade them to return if you can."] And that distinction ought to weigh in favor of the defendants here; they did all that they were bound to do, and all that they legally could do, for the benefit of the plaintiff; therefore they cannot be liable to an action at his suit. [*Best*, J. There is a case in *Rushworth* (*b*), where it was held, that the flogging of a slave could not be justified.] Sir *G. Cockburn* was clearly justified therefore in refusing to compel these persons to return to slavery, and as no claim was made to them after that period, the plaintiff must be taken to have acquiesced in their detention, and both the defendants having acted bonâ fide, this action will not lie, particularly as they acted for the best, in a situation

(*a*) 1 T. R. 493. (*b*) 2 Rushw. Coll. 468.

of considerable difficulty, and in a place flagrante bello. If these persons had been *American* subjects, it was the duty of the defendants to detain them, and the fact of their all speaking *English* might well induce a belief that they were so. If they were slaves, it was by force of the 46 *Geo.* 3. c. 52. illegal to transport them from one place to another, and so their detention was a mere act of duty. But the main and irresistible argument is, that these slaves, having of their own accord deserted from a country, by the municipal laws of which slavery was tolerated, and arrived at a place where slavery was prohibited and abolished, and did not exist, had by those means become free men, and could not legally be compelled to return to their former master. Upon that ground it is clear that the action is not maintainable.

*Comyn*, in reply. The distinction originally taken between slavery and the slave trade, has not been answered or removed on the part of the defendants, and therefore the argument built upon it remains unshaken, and goes far to support the plaintiff's case. The objection that the declaration does not aver that slavery was lawful on the spot from whence the slaves deserted, has no weight; the omission is unimportant, and the averment was unnecessary, for this reason; the *British* legislature have not declared that slavery is illegal; all the statutes on the subject are strictly confined to the slave trade, as a traffic; in all cases, therefore, where slaves are seized from their owner, while he is in the actual prosecution of the traffic, it is necessary to aver that he was lawfully in the exercise of it, and protected in it by the municipal laws of the country in which he is carrying it on; but in all other cases it is unnecessary. It is stated in the plaintiff's memorial, and it is also found by the case, that the plaintiff had been thirty years resident in *East Florida*; the correspondence between the two defendants assumes the fact, that the slaves were the property of the plaintiff, and that slavery was permitted in *East*

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*Florida*; the claim made by the *Spanish* Governor asserts, that the slaves were the property of subjects of that state; and therefore, altogether, there is enough to shew that slavery was permitted by the laws of the state, and to support the plaintiff's averment, that he was "lawfully possessed" of these slaves. The proposition that every slave who sets his foot on board an *English* ship, floating either on the high seas, or within the limits of an *English* port, becomes eo instanti free, has not been supported by any general authority, any known law, or any decided case; and the question whether an *English* ship, so circumstanced, is equivalent to the *English* soil, may be answered by drawing the same distinction between the one and the other, as has already been suggested between slavery and the slave trade. [*Best*, J. In some countries, the master has an absolute power of life and death over his slave; supposing him to take a slave on board an *English* ship, would he have the same power there? or, if he put him to death, would he not be guilty of murder?] It is not requisite to carry the argument to that extreme length. It has been asked "what could Sir *G. Cockburn* do, and how could he act, when these slaves put themselves under his protection?" His course was at once plain, safe, and easy. He should have said to them, "You are the slaves of a neutral subject, residing in a neutral state; being such, I cannot receive you;" and if he had in the first instance received them under a mistake, he should, so soon as he was undeceived, have put them on board the plaintiff's boat, in which they had come to him, and seen them safely landed on the nearest *Spanish* shore. Instead of that, he refuses to deliver them up, he detains them on board, and afterwards carrys them to *Bermuda*, a place where slavery is allowed, and employs them in the dock-yard there. When the war terminated, all the slaves in possession of the *British*, which belonged to *American* colonists, were given up to their respective owners; but the plaintiff's were still detained. Why was this? There was no ground for making any distinction

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between *Spanish* colonists and *American* colonists. *Sutton* v. *Johnstone* (*a*) has been relied on as shewing that this action will not lie against the defendants, because they have acted bonâ fide, and in the discharge of their official duties; but that case does not at all apply, in principle, to the present; it was decided there, that an action for a malicious prosecution would not lie against the officer of a court martial, because it was a competent court of jurisdiction, and lawfully constituted to inquire into the subject-matter of the plaintiff's conduct on that occasion. What bearing has such a case as that on the present, or what analogy is there between them? It is impossible to discover any. Another case, extremely important from its analogy to the present, and as shewing that the defendants in this case have acted throughout the transaction with a perfect knowledge that the persons whom they harboured, were the slaves of the plaintiff, has been wholly unnoticed, or at least its effect unanswered by the arguments on the other side. That is the case of *Blake* v. *Lanyon* (*b*). It is clear from that authority, that the defendants had sufficient notice of the property of the plaintiff in these slaves, to sustain the action in that respect; but if the evidence of his claim appeared to them equivocal or insufficient, they should have required additional proof, and it would have been supplied. It is said, that this part of the case applies exclusively to Sir *G. Cockburn*, and cannot affect the other defendant; but the subsequent conduct of Sir *J. A. Cochrane*, and his correspondence upon the subject, render him an active party to the whole transaction, and involve him in all the responsibility attaching to the other defendant. The final removal of these slaves to *Bermuda*, and their detention there after other slaves had been given up to their owners, was an act of aggression on the part of both the defendants, amply sufficient to sustain this action. It is supposed that they were ignorant whose slaves they were, or that they acted under a mistaken idea that they were *American* property.

(*a*) 1 T. R. 493. (*b*) 6 T. R. 210.

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Such a supposition is absurd. They could not have supposed them to be *American* subjects, because all *American* subjects of a similar description had been delivered up before these persons were removed to *Bermuda*. No other person, but the plaintiff, had made any claim for them; then to whom could they belong, but the plaintiff? They were evidently the slaves of somebody, and whose slaves could they be but the plaintiff's? [*Best*, J. The argument on the other side, is, that they were nobody's slaves; that they were no longer slaves.] That has been already answered by the observation that it is a mere assertion unsupported by dictum, decision, or law, and deserving, therefore, no more than assertion on the other side in contradiction. But a more efficient answer has been given, because it has been shewn, that as slavery was legalised in the state of *East Florida*, and was therefore to be respected by the Courts of *Great Britain*, these persons being harboured within the limits of *East Florida*, and being in fact then the slaves of the plaintiff, were not, could not be, redeemed or manumitted by the mere act of taking refuge in an *English* vessel. On this position the plaintiff's case must depend, and on this ground, unrefuted and unanswered as it is on the part of the defendants, it is contended, that the plaintiff is entitled to the judgment of the Court.

Bayley, J.—It is matter of great satisfaction to me, that this case, which is one of very considerable importance, and to a certain degree of considerable novelty, will be turned into a special verdict; and if after that, the parties should be desirous of having it re-argued in full Court, I shall be very much disposed to concur in that proceeding. At present, the impression upon my mind is, that the action is not maintainable. I think we may lay entirely out of the question the different decisions which have taken place in the Court of Admiralty; because I think that Court, without at all touching upon the question now raised, could not have decided in any other way. Different persons hav-

ing taken upon themselves to be active to seize vessels with slaves on board, on the ground, that by the law of nations, or the law of this country, they had a right to make such seizures; the Court of Admiralty says nothing more than this: "We will not give you our assistance in condemning this property; by the law of the particular countries, to which the claimants in these instances belonged, they had a legal property in that which you have seized, and as the Court of Admiralty is to act between one country and another, upon that which is the common principle of both, it cannot say, we will lend you our assistance in condemning a vessel for being engaged in that which, according to the municipal regulations on the country to which the claimant belongs, was no wrong. He had done no act which subjected his vessel to condemnation; and with reference to its own laws, this country has no right to say that he has been doing wrong, or that his property is subject to condemnation." The decision of the Admiralty Court, therefore, is substantially in the nature of an amoveas manus, and no more. As to the case referred to, of *Madraza* v. *Willes* (*a*), the defendant there having taken upon himself to be *active*, and to seize a ship, the Court, upon looking into the circumstances, said, "You had no right to make the seizure; we cannot justify your act; and therefore you must abide by the consequences of it." Having given what appears to me to be an answer to those respective cases, I will come more closely to that which is the subject in question. My opinion does not at all proceed upon the notion that slavery is not to be tolerated in the place in which these persons were slaves. I do not mean to express an opinion that an action may not, under some circumstances, be maintained for the enticing away, or for the harbouring a slave. My opinion is not founded upon the idea, that the instant a slave deserts his master's plantation, and escapes to another country where slavery is not tolerated, he, ex excessitate, becomes to all intents and purposes

(*a*) 3 B. & A. 353.

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a free man. That is not the foundation of my judgment to-day; I do not feel it necessary to decide that point at present one way or the other. But this I do mean to say, that there is a wide distinction between making the law of *England* active, and making it passive. In the cases which I have referred to in the Admiralty Court, the law has been considered as passive; but here we are desired to put it into activity, on the ground that the defendants have inflicted a wrong upon the plaintiff. In my view of the case, there is no ground for drawing that conclusion with reference to the conduct of the defendants, and the official characters which they filled at the period of this transaction. The grounds of complaint in this case are, first, that the defendants enticed away the plaintiff's slaves, upon which it is sufficient to say, that there was no evidence of any enticement whatever; second, that the defendants harboured certain individuals, knowing them to be the slaves of the plaintiff. On this point, I intimated to Mr. *Comyn*, as the case was going on, that there appeared to be no evidence to prove that the defendants had any such knowledge; that there was a claim on the part of the plaintiff, but a claim only, and I wished to know whether Mr. *Jervis* would concur in assuming that they had such knowledge. That, however, was declined. Perhaps the observations that I shall make upon the third count, will render this point, and my opinion upon it, the less material. It is said, that there is a third count which alleges that the defendants harboured and detained the slaves after notice that they belonged to the plaintiff; and the case of *Blake* v. *Lanyon* (*a*) is referred to as deciding that such a count is sufficient. Upon the authority of that case it is certainly clear that an action may be maintained against a party for harbouring after notice; but there is an additional and very essential allegation in that case, as in the present, namely, that the defendant *wrongfully* harboured after notice, and upon that arises the question, whether these slaves were *wrongfully* harboured by Sir *George Cockburn* or Sir

(*a*) 6 T. R. 221.

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*Alexander Cochrane*. I mention Sir *George Cockburn* first in order, because he was the foremost, and the more active party in the transaction, and necessarily so. In that case I take it for granted it was proved, that after the notice had been given, the defendant had full opportunity of making inquiry, and of satisfying himself whether that which was brought forward and asserted on the part of the plaintiff, had foundation in truth, or not. There would be no difficulty, with reference to any man resident within the kingdom, in ascertaining, as a fact, whether he was or was not the servant of one *A. B.*; but it by no means follows in the case of the captain of a man of war, upon a foreign station, that he can have the same facility in satisfying himself, or making any inquiry into the fact; and in many instances it may be utterly inconsistent with the duties which he has to perform as a servant of the public, to employ persons in ascertaining whether certain individuals, claimed as the slaves of one *A. B.* are, or are not, in point of fact, his slaves. The result of such inquiries, as could be made on the spot, under such circumstances, or of the investigation of the claims of different persons there, must be very vague and unsatisfactory. It might occur, that by collusion, or other means easy to suggest, false claims would be set up. I should very much doubt whether Sir *George Cockburn* could with any propriety either have gone in his own person, or have detached any of his officers or men from his ship, to go upon such an inquiry. Suppose an occurrence had happened in the absence of a part of his crew, which required the united strength and exertions of every individual composing it; it would be no excuse to the government of this country, for any neglect of that duty which he owed to them and to the public, to say, that he had dispatched a portion of his crew to ascertain whether some persons who had come over to his ship, and who had been claimed by different individuals resident in different places, in fact belonged to those who claimed them. He might have had 100 different slaves, refugees from as many different quarters;

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some from one colony and some from another; and if he was to make any inquiry at all, it would be necessary to visit every one of those places. His vessel was at a distance of thirty miles from the plaintiff's plantation, and he would have had to send that distance in order to make any efficient inquiry in the present case. But suppose he had been fifty or one hundred miles from the plantation; or suppose he had picked up these people far out at sea; what must he have done then? I feel no difficulty in replying to the question. He is to act bonâ fide. If it can be shewn that he has acted malâ fide, he is liable to an action; but so far as I can judge, in order to sustain an action against any person who fills a public office, as the defendants in this case did, it is essential to shew that he has acted malâ fide. Then how do the facts stand here? The plaintiff comes on board, claims the slaves as his property, and desires to have them dismissed from the ship, and delivered into his possession. Sir *George Cockburn* says, "if you can persuade them to go, they shall go." The plaintiff endeavours to persuade them, but they refuse. What is Sir *George Cockburn* then to do? It is said that he ought to send them out of the ship; whither is he to send them? Suppose they say, "we will not go; at least we will not return to *East Florida*; give us a boat; furnish us with the means of going away, and we will exercise the option of going to such place as we shall think fit; we will go to *Cumberland* Island." The plaintiff, it is to be observed, does not desire them to be set at large; he demands possession of them, and insists that they shall be compelled to return to his plantation. Then would Sir *George Cockburn* have been justified either in giving these people a boat, and suffering them to go wherever they chose, or in using force to compel them to go to any particular place? I am of opinion that he would not have been justified in pursuing either of those measures, and that considering the delicate and important situation which he filled, and the nicety, I may even say the difficulty of the legal question which he was thus suddenly called

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upon to decide, he adopted the most prudent, the most equitable, and the most liberal plan that was open to him. The question of law proposed to him was one respecting which there might be a contrariety of opinion even among experienced lawyers; then how was he to decide it? When a human being is a slave in a country where slavery is tolerated; how far the condition of slavery continues to attach to him when he gets without the limits of that state; and how far neutral states are warranted in treating him as a slave, or are bound to treat him as a free man; are questions of very considerable legal nicety. In this dilemma, Sir *George Cockburn* seems to me to have done that which a discreet man, acting bonâ fide, would and ought to have done. If he had said, as he had the power to say, "these men shall not remain any longer on board my ship, but I will not force them into your possession; they shall go where they will;" where would they have gone? Clearly they would not have returned to *San Pablo*, and therefore the plaintiff would not have been benefited by such an arrangement. But instead of that, he writes to his commander-in-chief, desiring to be informed how he is to act; he is told that the question can only be decided by the government, and he is directed, in case the government should decide it in favor of the plaintiffs to send the people to a place where they will be forthcoming, in order to be given up to their owner. As far as I can judge, therefore, the character of malâ fides does not attach in any respect to the conduct of either of the defendants; but on the contrary they appear to me to have acted throughout bonâ fide, and most considerately for the interest of the plaintiff. Then, upon the ground that the defendants did not, in the language of the declaration "wrongfully harbour and detain" these persons, I am of opinion that their characters as public officers placed them in a different situation from that in which other individuals might have stood, and that the plaintiff has not made out a sufficient cause of action in either of the counts, against either of the defendants. I do not think

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it necessary to enter more minutely into the question now, but if the parties shall succeed in convincing me upon the argument on the special verdict, that in adopting the principles which I have now suggested, I have in any respect been wrong; I hope I know enough of myself to feel that I shall be rather proud of acknowledging that I have been mistaken, than of tenaciously adhering to any opinion, merely because I have once expressed it as my own. My opinion at present is, that the plaintiff is not entitled to maintain this action.

HOLROYD, J.—I also am of opinion that the plaintiff is not entitled to maintain the present action. It is brought, as the case states, by a *British* subject, domiciled in the territories of a foreign power, and it is founded, not on any specific right under the law of the country where he resides, but upon a general right belonging to him, as being the proprietor, and in the possession of a cotton plantation, lying contiguous to the river *St. John's*, in the province of *East Florida*, and on which he employed divers slaves of him the plaintiff; and so claiming a general property in them as his slaves. According to the circumstances stated in the case, the plaintiff seems to have had no right in the slaves, except in the character of slaves; for they do not appear to have been serving under any contract to which they were parties; his claim therefore rests upon a general right to them as slaves, and upon that which it is for him to make out to be a wrong done by the defendants, an injury to that right which he claims. I take it that in *England* at least, and according to the principles of the *English* law, slavery cannot be considered as warranted by the general law of nature. I am not deciding whether particular circumstances may or may not introduce a legal relation to that extent; but, supposing they can, it can only exist so far as it is tolerated by the general or particular laws of places to which persons are bound to submit. The plaintiff therefore cannot maintain this action upon the general law, independently of

some local and positive institution, and his cause of action must arise exclusively from the right he possessed by the law of the country where he was domiciled. If he could shew that the defendants, being *British* subjects likewise, had gone into the country where he was domiciled, and deprived him of what was there considered as a right in him, and allowed to be enjoyed by him, I by no means say that he might not support an action against them. According to the opinion of Lord *Holt*, in *Smith* v. *Brown* (*a*), it appears, that being an inhabitant of *East Florida*, although a *British* subject, and entitled by the laws of that state to possess these persons as slaves, he might recover against these defendants for any act done by them there, and amounting to an invasion of his rights; and upon this principle, that the law of *England* will extend itself so as to protect the rights of *English* subjects, and to remedy any grievance committed upon them by *English* subjects in detriment of those rights, wherever they may be. I do not, however, think it necessary to express any decided opinion upon that point, because the present case does not render it requisite. This plaintiff is a *British* subject, resident within the *Spanish* colony of *East Florida*. By the law of that colony, I take it to be sufficiently stated in the case for us to infer, that slavery is there tolerated. I conceive that the right of slavery in a foreign country can be considered by the *English* law as a right founded, not upon the law of nature, but upon the law of the country; and therefore, supposing that the law of *England* can give a remedy to a *British* subject possessed of that right, against another *British* subject, resident in that country, and bound to obey the laws of that country, though they sanctioned rights that would not be sanctioned in *England*; still the plaintiff does not appear to me to be entitled to such a remedy. If the plaintiff's right be considered as founded upon the law of *Spain*, extending to this *Spanish* colony, it can be only co-extensive with the territories of that state. I do not mean to say that the same

(*a*) 2 Salk. 666.

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right which he possessed over these persons in *East Florida* by the law of that place, would not also have extended over them in any other place where the same law existed, if he had removed them thither without doing any other act of emancipation; but when the slave escapes out of the territory where the law exists, into another where it does not exist, and withdraws himself out of the power and possession of his master, into the protection of a person who cannot by the law of his country be the owner of a slave; then I think the right of the master, being co-extensive only with the municipal law of his own country, does not continue in the slave, but the slave becomes entitled to that freedom and independence which is secured by law to all the inhabitants of the country in which he has taken refuge, and from which he has sought protection. We know, by experience, that the fact is so with respect to all our own colonies; the moment a slave from any one of them steps on *British* land, there is an end of his slavery, he is a free man. Suppose the case of an uninhabited island discovered, and colonised by this country; undoubtedly all those who went to settle there would be under the protection and governed by the laws of *England*. In the case of a conquered country it might not be so; because in such instances the original laws are frequently permitted to prevail. But in a country discovered and colonised by *England*, the *English* laws would unquestionably prevail, and freedom would be as much the inheritance and the right of the inhabitants, as if they continued to live upon *English* soil. Suppose a slave from any part of the globe were to effect his escape to a place so circumstanced, would he not become free as much as if he had escaped to *England* itself? I confess it appears to me that he would. He would cease to be a slave in *England*, because the laws of *England* prohibit his detention in slavery, and declare that all who breathe her atmosphere and tread her soil, shall be, and are free; and I apprehend that the same reasons and principles would render him a free man if he landed upon any place which

was governed by the same beneficent laws, even though he would have continued a slave while he remained in any of those *British* colonies where slavery is permitted to exist. Then what is the situation of the slaves in question? It is true that they did not escape to any spot of land belonging to *Great Britain*, and where consequently slavery is prohibited; but they go on board a *British* man of war, lying contiguous to *Cumberland* Island, a part of the *British* dominions, and there place themselves as refugees under the protection of a *British* officer. On board that ship the laws of *England* prevailed, and slavery could not exist; and therefore they came within the operation of those laws, and stood in precisely the same situation as if they had landed upon any coast which formed part of the *British* empire. That being the case, it was no wrongful or illegal act in the defendants to receive and shelter them; quite the contrary: the right which the *Spanish* law gave their master over them had ceased; they had got beyond his control, and out of the territory where the law which doomed them slaves prevailed; and they were under the protection of individuals who were perfectly independent of the laws of *Spain*, because they had not entered the *Spanish* territories either as friends or foes. In this situation what is done? The plaintiff comes and claims the slaves. Sir *George Cockburn* says, "If you can persuade them to go with you, you are at liberty to do so." Is he able to persuade them? No; they refuse to accompany him. He was not permitted to add force to persuasion, nor did Sir *George Cockburn* use any force: indeed no such application seems to have been made to him, and therefore the refusal cannot be imputed to him; nor does it appear that either party had the means of enforcing their return, if an application to that effect had been made. They are then suffered to remain on board, open to all the persuasion, short of actual violence, which the plaintiff could employ upon them, and more than that I think Sir *George Cockburn* had no right either to do himself, or to permit to be done by others. I think it was no

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wrongful act in him, being a *British* officer, chief in command on that spot, though under the command of a superior officer stationed at a distance, not to suffer these persons to be removed by force; and upon that ground I am of opinion that this action is not maintainable. I have hitherto given my opinion upon the assumption that there was a right of action in the plaintiff, and a wrong done by the defendants, for which he was entitled to a remedy; but that this is a case in which an action will lie, considering the particular situation of the place where the transaction occurred, being flagrante bello, and where the defendants were acting as public officers in the discharge of a public duty, I by no means admit. Supposing, however, that there is, strictly speaking, a ground of action, it might be matter for consideration, whether the remedy sought should not have been by some other mode, as by applying to the superiors of the defendants, or to the government of the country. The cases from the Admiralty Court, I think, differ essentially from the present in the particulars which have been already so clearly pointed out by my Brother *Bayley*. The case before the Court is very distinct also from that of *Madraza* v. *Willes* (a). There, the plaintiff being a *Spanish* subject, and the slave trade being tolerated by the laws of *Spain*, he had a right sanctioned by those laws to carry on the trade, and the subjects of this country, being in amity with *Spain*, had no right to interfere with his pursuits. The defendant therefore wrongfully deprived him of a ship engaged in a traffic warranted by the laws of the country to which it belonged; it was an act done in violation of the right which the laws of his own country gave him. But here an application is made to restore to the plaintiff slaves, not taken from him by the defendants, but who had come voluntarily to the defendants for protection, and who, when they had escaped from the territory where they were slaves, and from the power and control of their master, had by the general law become free, unless the law of slavery prevailed on the spot where the

(a) 3 B. & A. 353.

defendants received them, which it certainly did not. For these reasons I am of opinion that this action cannot be supported.

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BEST, J.—This case might have been decided on a very short ground against the plaintiff, but my learned Brothers have not gone merely upon that ground, but have entered into the general question. I think that has been properly done, because if the case had been decided upon the ground to which I shall presently advert, it would only have led to another action, and therefore we are acting most prudently by expressing our opinion that the action could not be maintained in any possible form of declaration, or upon any evidence that could be produced. In going into the general question, feeling as I do, and as I have ever felt, upon the subject of slavery, it is perhaps possible that I may express myself with some degree of warmth. I beg, however, to guard myself against being misunderstood, and to premise, that nothing I may say is meant to be taken as touching upon the local rights of the inhabitants of the *West India* Islands to the services of their slaves in that country. They have acquired those rights under the encouragement of *English* law, and those rights cannot be put in jeopardy by any thing done by any power in this country, without completely indemnifying them from all possible consequences. The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible; it ought not to be continued one moment longer than is necessary to fit the slaves for a state of freedom; for our convenience, or for our gain, it ought not to be allowed to exist. The plaintiff states his right in terms so general, that probably advantage might have been taken of it by a general demurrer. He claims a right to slaves or servants. I take it that would have been sufficiently certain after verdict; but being sufficiently certain after verdict, we must see what sort of servants these are. The case shews that they are not servants in our idea of the

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word; they are servants in the sense that the word "servi" conveys, because that undoubtedly conveys the idea of slaves in the most abject state of slavery; but unquestionably they are not servants such as an action can be maintained for in this country: they are not contract servants, but slaves. The objection which occurred to me when I first looked at this case was this—how am I to know that the right of slavery exists in *East Florida?* The right of slavery is not a general right; it is a local right; it is spoken of by every writer that has ever written upon the subject as a local right. If that be so, you must first shew me that that local right exists in the place where you lay the foundation of your claim. Now there is nothing upon this record, nor any thing in any of the facts of the case, which shews that slavery is tolerated in the state of *East Florida.* I was about to add, that it would be further necessary to shew, and to explain to our ignorant minds, what slavery is. We have no such title in the *English* law, and have no case which furnishes us with any idea of the rights which a slave-master has over a slave. It appeared to me we should be right in saying, "you have not shewn that at the place from which these people escaped you had a right to keep them in slavery." Of the existence of a right which grows out of a state of slavery, our ideas can be drawn only from the fountain of *English* law, and that furnishes us with no idea upon which we can form a judgment. But, if this record were amended, if in addition to the facts upon this special case (which is to be turned into a special verdict) it appeared, that slavery did prevail in *East Florida,* and that these persons were all actually and legally slaves there, still I am decidedly of opinion that this action could not be maintained against these *British* officers for what they have done under the circumstances of this case. It is perfectly clear that by no act of the defendants have these slaves been seduced from the services of their employer; if they had, it would have been very different. The proclamation which they issued was addressed to the inhabitants, not of *East Florida,* but of

*America*, with which state we were then at war; it had no reference to the inhabitants of *East Florida*, nor could the defendants have supposed that it would ever find its way thither; for Sir *George Cockburn* did not circulate it within 400 miles of the confines of that settlement. It is impossible to suppose he could imagine that it would ever find its way into *Amelia* Island, and have any effect upon the slaves there; it is admitted therefore that the count for the seduction must be given up, and that the only count in this declaration upon which it would be possible to support the judgment, would be the count for harbouring the slaves. That brings me to the question upon which my judgment is founded, namely, were these persons slaves at the time when Sir *George Cockburn* refused to do the act he was desired to do? I am decidedly of opinion they were then no longer slaves. The moment they got out of the confines of *East Florida*, and set their feet on board a *British* man of war, that not being within the waters of *East Florida*, where, undoubtedly, the laws of *East Florida* would prevail, those slaves were free. Nothing therefore was done, or omitted to be done, by these defendants, prejudicially to the interests of the plaintiff. Slavery is a local law, and, if a man wishes to preserve his slaves, let him attach them to himself by the ties of affection, or make fast the bars of their prison; for the moment they get beyond his local limits, they have broken their chains and have recovered their liberty. They were, as was properly said by Sir *George Cockburn*, free agents, they had all the rights that belonged to *Englishmen*, and were subject to all the liabilities to which *Englishmen* are subject. If they had been guilty of any offence, they must have been brought to answer for it in *England*; if any injury had been done to them, they had full right to apply to the laws of this country for redress; and, if that injury amounted to an offence, for punishment upon those who were the authors of it. Sir *George Cockburn* went as far as he could go, when he said, "Use persuasion; if they think proper to go

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back, I will not interpose; I did not bring them here; I cannot force them away." He might have added, "Nor can I permit force to be used upon them; I am an officer of the king of *England*, whose duty it is to protect all his people, and I cannot allow any force to be used here, beyond that which the law of *England* will warrant." I asked this question very early in the argument; if any force had been used by the slave-master, or any man in his aid? Is there any man, layman, or lawyer, who would doubt that any one of those slaves might have brought an action against any person who used that force? I go further: if a slave, acting upon his newly-acquired rights of a free man, had determined to vindicate the rights of his nature, and had said, "I will not be forced back into a state of slavery," and his death had ensued upon his resistance, it would have been murder in every individual who had contributed to that death. It appears to me that no one can doubt that those consequences would have followed, and must have followed according to decided cases. The case of *Somerset* (*a*) has decided, that if such a transaction had occurred in *England*, those consequences would have followed. Is there any difference in law between an *English* ship upon the waters of the sea, over which the *English* flag is flying, and the *English* land? Is not every man in that ship as much protected and governed by the *English* laws, as if he had actually set his foot upon the soil of this country? If so, there is no difference between an *English* ship and *English* land, and then the case of *Somerset* has decided this case; for if *Somerset* was entitled to his discharge, all who attempted to force him back into slavery would have been liable to actions for the act they had done in contributing to that unlawful end. It has been said by Mr. *Comyn*, who has argued this case with great ability, that Sir *George Cockburn* might have sent these slaves back; he certainly was not bound to carry them in his ship; but he could no more force them back into slavery than he could have com-

(*a*) Lofft. 1. Ho. St. Tr. vol. xx. p. 1. S. C.

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mitted them to the deep: it would have been a more charitable act, perhaps, to have cast them into the waves than to have sent them back into slavery; for, in addition to the punishment for quitting their service, probably death itself would have been the result of the experiment; and I put it to any man whether he would argue that Sir *George Cockburn* would have been justified in placing them in so dreadful a situation. It appears to me that there may be a distinction taken between the case of these persons, and that of slaves coming from our own colonies; for we have unfortunately recognised the existence of slavery in our colonies, though we have never recognised it in our own country. This plaintiff comes, not to complain of the violation of any confidence inspired in him by any *English* laws, but by the comity of nations. I am of opinion that by the comity of nations he can maintain no action in this country; but, although I am aware that the *English* law has recognised slavery, it has done so only in certain local limits, and I deny that in any one case, except one upon which I shall observe presently, an action has been held maintainable upon a right growing out of slavery, within the municipal courts of this country. We find, upon looking into the history of this subject, that Queen *Elizabeth* once expressed her hope to Sir *John Hawkins* that the negroes went voluntarily from *Africa* to submit to a state of slavery in another country, and declared, that if any force was used towards them, it would draw down the vengeance of heaven upon the country. It is unfortunate for the memory of that Queen, that during her reign patents were granted to carry on the trade, and those were followed up by statutes expressly recognising it, and by regulations made for the carrying it on. The legislature, interfering from motives of humanity, regulated the mode of carrying slaves in the middle passage, as it is called; and they also thought proper to regulate the making of insurances upon slaves who should die natural deaths. There is also an act, passed at a time when one is surprised that it should be passed, immediately after we had

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accomplished our own liberty by the great and glorious revolution, in 1688, which certainly speaks of these unhappy beings by the degrading appellation of merchandise, and authorises their being brought to *England*, not indeed as the termination of their voyage, but as a place at which ships engaged in the traffic might touch. Notwithstanding that act, however, I think, that if any slaves had so come to this country, and had got within the waters of *Portsmouth*, a great many of them would have been discharged by habeas corpus. There are also two later acts of parliament, by which slaves in the *West India* islands are made subject to the debts of the persons to whom they belong, and saleable. I do not recollect what particular language is applied to them there, but they are spoken of as being saleable like any other species of property. Both these statutes are local in their application; neither of them applies to the whole empire; they are confined to the *West India* islands exclusively. I do not feel myself fettered, by any thing expressed in any of these statutes, from pronouncing the same opinion respecting such rights as grow out of slavery, as I should have pronounced if they had never been passed; and it remains for me to consider, whether a great and learned commentator upon the laws of this country is correct in what he has said, that if a statute orders us to do that which the *Christian* religion forbids, we are not to obey the statute; because, if that is correct, these statutes, even if they extended over all *England*, would not interfere with my opinion. But happily there is no statute of that kind which operates in any degree whatever within that part of the *British* empire in which we are now sitting to administer justice; they are all confined to the *West India* islands, and it is matter of pride to me to recollect, that while senators and statesmen were devising enactments to encourage this practice, and recommending the legislature, so lately as the reign of *George* the Second, to declare that it was beneficial to the country: at that very time, the Judges of the land in *Westminster* Hall, and disdaining to

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resort to the narrow doctrine of expediency, rose superior to the age in which they lived, and declared, that these people could not be the subject of property. As a lawyer, I speak of these early determinations, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride; and I venture to say, that there is no decided case in which an action, founded upon the right of slavery, has been recognised in this country. I am aware of the case of *Butts* v. *Penny* (a), where a contrary opinion is intimated by a man, for whose memory I have a great respect; but the case was never decided, and therefore I have a right to say, that such an action is not recognised there. But if it had been, Lord *Holt*, in *Smith* v. *Gould* (b), in unison with the whole Bench, declared that the former case was not law, and it is thus referred to in Lord *Raymond's* Reports, "Sed non allocatur, for, per totam curiam, this action does not lie for a negro, no more than for any other man; for the common law takes no notice of negroes being different from other men. By the common law no man can have a property in another, but in special cases, as in a villein, but even in him not to kill him: so in captives took in war, but the taker cannot kill them, but may sell them to ransom them: there is no such thing as a slave by the law of *England*. And if a man's servant is took from him, the master cannot maintain an action for taking him, unless it is laid per quod servitium amisit. If *A.* takes *B.*, a *Frenchman*, captive in war, *A.* cannot maintain an action, quare cepit *B.* captivum suum Gallicum. And the Court denied the opinion in the case of *Butts* v. *Penny*, and therefore judgment was given for the plaintiff, for all but the negro, and as to the damages for him, quod querens nil capiat per billam." Admitting therefore, that *Butts* v. *Penny* was decided, still it is over-ruled by this case, as it was also by a previous case of *Gelly* v. *Cleve* (c). The case of *Smith* v.

(a) 2 Lev. 201. 3 Keb. 785. S. C.

(b) 2 Salk. 666. 2 Lord Raym. 1274. S. C.

(c) 1 Lord Raym. 147.

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*Brown* (*a*), has also been cited, as opposed to this doctrine; but I believe that case has been quite misunderstood, as will appear by the judgment of Lord *Mansfield*, in *Somerset's* case (*b*), in the course of which, he says an action for the property in negroes might be maintained. All that the Court did in *Smith* v. *Brown*, was to say, "If you want to agitate this question, you must amend your declaration; you cannot maintain your action for a negro sold in this country; you must state the fact upon the record (and this is most material to the point I originally put) that those negroes were sold in *Virginia*; and even that is not enough, you must go on to state, that in *Virginia*, negroes can be legally sold." Whether that amendment was made, I do not know, but if it was, it certainly was never decided upon. Lord *Holt's* own words are, "You should have averred in the declaration, that the sale was in *Virginia*, and by the laws of that country, negroes are saleable; for the laws of *England* do not extend to *Virginia*, being a conquered country, their law is what the king pleases; and we cannot take notice of it but as set forth;" "therefore (adds the reporter) he directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at *London*, but that the said negro at the time of sale, was in *Virginia*, and that negroes, by the laws and statutes of *Virginia*, are saleable as chattels. Then, the Attorney-General coming in, said, they were inheritances, and transferrable by deed, and not without: and nothing was done." That point, I feel confident, misled Lord *Mansfield*, when he made the observation, to which I shall allude by and by. It is said, slaves are inheritances, and transferrable by deed, and therefore an action of assumpsit cannot be maintained for them, but I must state in reference to the present case, that these slaves belonged to a foreign state; the case would have been very different if these had been slaves belonging to one of our plantations in which slavery was recognised; but the

(*a*) 2 Salk. 666.

(*b*) Lofft's Rep. 1. Ho. St. Tr. vol xx. p. 1. S. C.

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state of *East Florida* is a foreign state. The plaintiff's right therefore, must depend upon that which is called comitas inter communitates. Now, it appears to me, that there is a maxim which completely prevents the plaintiff from recovering upon that comity in such a case as this. I have looked many times into this point, and I take this to be the principle, that the comitas inter communitates is never allowed to prevail, except where it can prevail without violating the laws of our country, without violating the laws of nature, and without violating the laws of God. If the claim set up is repugnant to either of these, it cannot be vindicated in our Courts of Justice, because our Courts of Justice are regulated by all these three; they are founded upon the *English* law, and the *English* law is founded upon the law of nature and the revealed law of God, and if the right sought to be asserted, is inconsistent with either of these, the *English* municipal Courts cannot recognise it. Now this principle I beg to add, is recognised not in *England* only, but by the laws of all *Europe*, for there is a famous case decided in the *French* Courts (*a*), upon which Mr. *Hargrave* says, when the *French* were groaning under the despotism of *Louis* the 15th, they were making the most exalted declarations of the liberty of their own country, and declaring, that the moment a slave set his foot in *France* he was free. There is also a case in the Courts of *France*, in which that question was much more philosophically discussed than it has been in any case in this country, and I would refer upon this part of the case to a paragraph in *Blackstone* (*b*); "Upon these two foundations, the law of nature, and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." It is quite clear that slavery is contrary to the law of *England*; and if I can shew that it is contrary to the law of nature, for which I can give the strongest authority; and if I can shew that it is contrary

(*a*) The Negro case, reported in Les Causes Celebres, vol. xiii. p. 492. Ed. 1747. See 20 Howel's St. Tr. 12. et seq.

(*b*) 1 Comm. 41.

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to the law of God, of which we are constantly speaking as the foundation of the law of *England*; then it follows, that we cannot recognise it here. The same writer, in a subsequent page says (*a*), " the law of *England* abhors, and will not endure the existence of slavery, within this nation: and now it is laid down, that a slave, or negro, the instant he lands in *England*, becomes a free man; that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of *John* or *Thomas*, this will remain in exactly the same state as before." He then goes on to explain how the right to perpetual service is to arise, and says, " whatever service the heathen negro owed of right to his *American* master, by general, not by local law, the same (whatever it is) is he bound to render when brought to *England*, and made a *Christian*." Now whatever he may owe by the local law, is got rid of the moment he gets beyond the local limit, and what service is it that we owe by the general law? It is service to our country, and to our relations, for the protection they have afforded us, and such service as we may chuse to enter into by contract; but a state of slavery excludes the possibility of a right to service arising out of any of these. A slave has no country; he is not reared for his own benefit, but for the benefit of his master; he is incapable of entering into a contract; he has, as it has been said by inspired eloquence, been bought without money, and shall be redeemed without price. We want no better authority than the civil law, for saying that slavery is contrary to the law of human nature. We know that the civil law has supported this degrading trade, for in the Digest, lib. 1, tit. 3, sec. 2, it is said, " Servitus autem est constitutio juris gentium, quâ quis dominio alieno contrà naturam subjicitur:" so that we have the Digest expressly declaring, that slavery is a subjugation of society, which society has no right to make, because it is against the inalienable rights

(*a*) 1 Comm. 424.

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of nature. We have ourselves also, as a nation, given judgment on this subject, for though undoubtedly in the reign of *George* the Second, the legislature declared this a traffic beneficial to the country, and one which ought to be encouraged, still by a late statute we have put an end to it; we have done more, we have bought up at a large price the right of other countries to carry on the same traffic; perhaps we were not compelled to do that; perhaps we might have been justified in using the power we possessed to put an end to it; it would have been a glorious alliance to have united ourselves with the weak against the strong, and so to have abolished this usurpation against the rights of nature: But, it may be, we were conscious that we had received too large a share of the profits arising from this most infamous traffic, for us to cast the first stone, and may justly have paid this sum of money as a sin-offering for past transgressions. I believe we have now purchased from every state in *Europe* the right of carrying on this traffic, and our laws have expressed in the strongest terms the indignation of this country at the idea of its longer continuance. I have referred to the authority of the learned commentator to prove what we are in the daily habit of declaring, that the law of *England* is founded upon Christianity. I know it may be said that slavery was tolerated by the *Jewish* law, and is not in express terms forbidden by the law of *Christ;* but the observation does not apply to negro slavery. By the old dispensation no man could be a slave for life without his own immediate consent; none but a stranger could be made a slave, and he was set at liberty in the year of jubilee, unless he consented in the most full and public manner to continue a slave. But whatever might be the law under the *Jewish* dispensation, slavery is clearly condemned in principle by Christianity. That divine and benevolent system has put an end to the distinctions which existed between the different races of mankind prior to the time of its establishment, and out of which slavery grew. It arose out of a depraved state of feeling entertained by one nation towards another, not con-

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sidering them of the same flesh and blood. A great *Grecian* philosopher has expressed his opinion that every nation of the world was formed to furnish slaves for the little portion of the globe of which he was a native; but the Christian religion is founded upon better principles; its maxim is, that we are all the children of one common parent; and how shall a human being be degraded into a slave while such a religion exists, which prohibits all force and all guile, even to repel an injury or an insult? A man cannot be made a slave except by force or fraud; they are both condemned by Christianity; the whole system is directly opposed to the Christian religion, and therefore it is contrary to the law of *England*. Lord *Mansfield* has said in *Somerset*'s case that a contract for the sale of a slave is good here, and he speaks of the point as having been decided. I can only say that I have searched with all the industry of which I am master, and that I can find no such decision; the case in *Salkeld*(a) certainly does not decide it. He, however, goes on to add, what is extremely material to the subject; for he says, "the question is, whether any dominion, authority, or coercion, can be exercised over a slave in this country. The difficulty of adopting the relation of slavery at all, without adopting it in all its consequences, is extreme: many of its consequences are absolutely contrary to the municipal law of *England*." I have therefore the authority of Lord *Mansfield* for saying, that if we adopt slavery at all, we must adopt it altogether, and that we cannot adopt it altogether without running counter to the municipal law of this country. What is the result? It must be taken to be not only his judgment, but the judgment of the whole court, that slavery cannot be adopted at all in this country, because it cannot, by law, be adopted with all its consequences. The negro *Somerset* was discharged, and, if discharged, had he not a right of action against those who had detained him? I think it follows as a necessary consequence that he had, and if so, how is it possible that any action can be maintained against

(a) *Smith* v. *Brown*, 2 Salk. 666.

either of these defendants, unless there is, which I am perfectly satisfied there is not, a legal difference between an *English* ship, and the soil of *England*? On the spot where this transaction took place the plaintiff's rights were at an end; the slave had made his escape, and had redeemed himself. The defendants might, if they had placed these people in some other place of safety, have prevented their continuance in the ship; but they would have incurred a heavy responsibility if they had delivered them into the grasp of him who would have dragged them back to slavery. Had they been near enough to the *English* coast for a habeas corpus to reach them, they might have been discharged by that process; then they had a right to be discharged where they were; and if so, they were there clothed with all the rights of *English* subjects, both by the civil and criminal code of *England*; and would it not be the grossest absurdity to contend, that any action can be maintained against any individual, merely for refusing to assist in the violation of those rights, in depriving them of their freedom, and in plunging them back again into slavery? I have already stated that I am of opinion that this case might well be determined upon the short ground, that it does not appear before us that the plaintiff has any rights whatever in respect of these persons, because he does not shew that the law of slavery prevailed in *East Florida*. But if it did prevail there, it is a local law; it is an anti-christian law; and it cannot be extended beyond the limits of its own state, nor be recognised as law in a country like this, where the Courts of Justice are regulated according to the law of nature, and the revealed law of God. For these reasons I am decidedly of opinion that this action cannot be maintained.

Judgment for the defendants.

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## MILLMAN v. PRATT.

In an action for slandering plaintiff's title to sell his interest in a leasehold house and premises, [the remainder of a term of 99 years, commencing in 1791, in which, he had purchased of the defendant, subject to an agreement reserving to the latter a right of repurchasing upon certain conditions, which were not performed], the declaration averred, "that *the said interest* of him the plaintiff, of and in the said premises, to wit, all the rest, residue, and remainder of the said term of 99 years then to come and unexpired, was put up to sale, but that by means of said slander, divers persons who were desirous of purchasing plaintiff's *said interest* in the said premises were deterred from so doing," &c. and it appearing in evidence that the interest actually put up to sale was *an under lease for 22 years*, to be granted by the plaintiff to the purchaser:—Held, that this was a fatal variance.

CASE for slandering the plaintiff's title to a house and premises in the county of *Surry*. The declaration stated that one *Mathew Winter*, and one *Horatio Leggatt*, before the time of committing the grievances, &c. being lawfully possessed of a certain dwelling-house and parcel of land, situate, &c. for the residue of a term of 99 years, commencing in 1791, assigned to them by defendant in trust to sell; by indenture of 8th *May*, 1815, between the said *M. W.* and *H. L.* of the first part; defendant of the second part; and plaintiff of the third part; the said *M. W.* and *H. L.*, and defendant, sold the premises to plaintiff for the sum of 1600*l.*, then paid by him to the said *M. W.* and *H. L.*, for the then residue of the term, and that plaintiff entered into and became possessed thereof; that by agreement of the same date, made between plaintiff and defendant, reciting that indenture; reciting that plaintiff had agreed to purchase of defendant certain fixtures at a valuation to be made; and reciting that it had been agreed that it should not be lawful for plaintiff to sell the premises, but that after five years defendant should be entitled to re-purchase them upon giving six months notice, to end 6th *November*, 1820, and upon paying 1600*l.* and the value of the fixtures; and that if defendant should not give such notice, that then he should be entitled to re-purchase upon the like conditions after ten years, but that in the mean time plaintiff should be at liberty to grant a lease or leases of the premises not exceeding five years each; it was agreed that if such notice was given, and such payment made, defendant should become the purchaser of the premises, and plaintiff would at the cost of defendant assign them to him for the then residue of the term; but that if no such notice was given, and no

such payment made, then defendant should be at liberty to purchase the premises after ten years, upon giving six months notice, and paying the 1600*l.* and value of the fixtures; that plaintiff should be at liberty to grant a lease or leases of the premises not exceeding five years from the date of the agreement, and in default of notice to lease for five years more: Provided that in case plaintiff should at any time be under the necessity of selling the premises and fixtures, he should be at liberty so to do, upon giving six months notice to defendant, unless defendant should in the mean time and before the expiration of such notice pay the 1600*l.* and the value of the fixtures. The declaration then averred that the fixtures were valued at 26*l.* 3*s.*; that defendant did not at any time prior to the notice given by plaintiff to defendant, give any such notice to plaintiff, nor pay the 1600*l.* or the 26*l.* 3*s.*; that on the 1st *June*, 1817, plaintiff was under the necessity of selling the premises, and on the 12th *June*, 1817, gave notice to defendant of his intention to sell the same at the end of six months from that day, unless defendant should pay the 1600*l.* and the 26*l.* 3*s.* in the mean time; that defendant did not so pay, and thereupon plaintiff became entitled to sell the premises; that on the 8th *May*, 1820, defendant gave notice to plaintiff that he would, on the 8th *November* then next, pay the 1600*l.* and the 26*l.* 3*s.*, and require plaintiff to assign to him the then residue of the term; that the said notice, so given by defendant, was nugatory and void; that on the 28th *July*, 1820, defendant filed a bill in Chancery, and obtained an injunction to restrain plaintiff from selling the premises, which was afterwards dissolved; that on the 21st *September*, 1820, plaintiff caused his interest in the premises, to wit, all the rest, residue, and remainder of the said term of ninety-nine years then to come and unexpired, to be put up to sale by public auction. Yet defendant, well knowing all the premises, and that plaintiff had full right to sell the same, and contriving to hinder plaintiff from selling the same, published the following libel, of and concerning plaintiff's title to and right

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to dispose of the same, in the form of a notice, and containing a copy of the said agreement:—"Take notice that the above is a true copy of an agreement entered into between *George Millman* and me, the undersigned, *John Pratt*, and that in pursuance of such agreement a notice was duly given on the 8th of *May* last, of my intention to pay the sum of 1600*l.* in the said agreement mentioned, for the reconveyance of the said premises, and that I shall be ready to pay the said sum of 1600*l.* on the 8th of *November* next, being the time specified in the said agreement; and further, take notice, that I have instituted a suit in the Court of Chancery against the said *G. M.* to carry into effect the intent and meaning of the parties to the said agreement." By means whereof, divers persons who were desirous of purchasing plaintiff's *said interest in the said premises,* were deterred from so doing, and the same was not then, nor has at any time since, been sold, and plaintiff has never yet been able to sell or dispose of *his said interest in the said premises,* to plaintiff's damage, &c. Plea, Not Guilty, and issue thereon. At the trial, before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after last *Trinity* Term, it appeared from the evidence of the auctioneer employed on the occasion, that the interest actually put up to sale was an under-lease for twenty-two years to be granted by the plaintiff to the purchaser, whereupon it was objected for the defendant that this was a fatal variance between the declaration and the evidence; the former averring that "the said interest of him the plaintiff of and in the said premises, to wit, all the rest, residue, and remainder of the said term of ninety-nine years then to come and unexpired," was put up to sale, and the latter shewing that nothing more than an under-lease for twenty-two years was put up to sale; and the learned Judge being of opinion that the variance was fatal, nonsuited the plaintiff.

*Scarlett*, in *Michaelmas* Term last, having obtained a rule Nisi to set aside the nonsuit,

*Marryatt* and *R. Bayly*, now appeared to shew cause, but were stopped by the Court.

*Scarlett* and *Carter*, in support of the rule. The supposed variance, even if it be a variance at all, is not material in the present form of action. The gist of this action is the slander thrown upon the plaintiff's title; his title arose out of an assignment in trust, to sell the estate, unless it was redeemed within a certain time; it was in fact an actual assignment, only coupled with a condition not to sell until a certain period; which period had arrived. The matter of inducement in the declaration may be larger than the precise fact, but that is unimportant, in the same view as the statement of damage is always larger than the real damage sustained, and is always considered as immaterial. The description of the interest put up for sale, was used merely as a mode of estimating the damages, and therefore need not be proved precisely as described. The plaintiff clearly had a right to sell some interest in the property, and if he had a right to sell any interest, however small, his title has been slandered. [*Abbott*, C. J. The defendant also had some interest in the property; he was not a stranger; he was not a mere wrong-doer; he had a right to object to the sale, if he thought it went to compromise his rights. *Holroyd*, J. The declaration states, that by means of the libel, the plaintiff has not been able to sell his *said interest* in the premises; now that interest was not offered for sale. *Bayley*, J. The plaintiff, therefore, has not made out his main charge against the defendant; he never intended to sell his *said* interest; his object was to sell a part of it.] That argument can only go to affect the quantum of damages; the power to grant a lease was part of his interest, and that he put up to sale. [*Holroyd*, J. Is the granting an underlease, a sale at all? The sale of an existing interest is one thing; but the sale of a power to create an interest de novo, is another. I think that distinction applies here.] By the terms of the agreement the plaintiff had absolute power

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to sell, and therefore in an action of tort, he has proved sufficient. [*Holroyd*, J. Still the cause of action must arise out of the same subject-matter; it must be the same pro tanto.] Undoubedly it must, and so it is in the present case. That appears clearly from the proviso in the agreement, which states that in case the plaintiff shall at any time be under the necessity of selling the premises, he shall be at liberty to do so upon giving six months' notice to the defendant, unless the defendant shall, before the expiration of that notice, pay the 1600*l*. and the price agreed on for the fixtures. [*Holroyd*, J. Does it any where appear from the agreement, that the plaintiff had power to under-let the premises?] The maxim that the major includes the minor, will answer that objection; he had absolute power to sell the premises by the express terms of the agreement, and therefore he had impliedly power to let them. [*Bayley*, J. The notice given to the defendant is of the plaintiff's intention to sell, and he avers that he did put up to sale his interest in the premises. Did he in point of fact do so? Certainly not; he puts up to sale an under-lease, which does not support his declaration. His ground of action is, that he was about to sell all his interest, and was prevented by the defendant from so doing; the fact is otherwise; then his ground of action fails. *Best*, J. Non constat that the defendant intended to impeach the plaintiff's title to let the premises; his objection might be confined to the sale of them.] An averment that the plaintiff had a right to sell a term of years in the premises, would not have been bad on demurrer, and if so, this declaration is sufficiently supported by the evidence.

ABBOTT, C. J.—I am clearly of opinion, that this is a fatal variance. The averment respects the whole interest in the premises; the evidence goes only to a part. Such a mode of declaring was prejudicial to the defendant, because it shut him out from contesting the plaintiff's right on the record. It is not open to us, in this state of the case, to

consider the general question whether the plaintiff had or had not a right to do what he proposed to do. His evidence does not support his declaration, and therefore he cannot maintain the action.

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BAYLEY, J.—No relation of vendor and vendee would have been created by the course the plaintiff proposed to adopt, but merely that of landlord and tenant. That would not support his declaration, for he was creating a new term, not selling an existing one.

HOLROYD, J.—The plaintiff declares upon a libel of and concerning his right to sell his said interest in the premises. All that he attempted to do was to let the premises, which will not support his declaration.

BEST, J. concurred.

Rule discharged (*a*).

(*a*) Vide 4 Burr. 2422. 4 Co. 18. 3 Taunt. 246. 1 M. & S. 639. and 2 B. & A. 360.

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THOMPSON and Others *v.* GILES and Others, Assignees of ANDRADE and Another, Bankrupts.

TROVER for nine bills of exchange. Plea, Not Guilty, and issue thereon. At the trial before *Abbott*, C. J. at the *Summer* Assizes for *Lancashire*, 1822, a verdict was found

Where the customer of a country banker was in the habit of paying in, bills of exchange, which were never written short, but entered to the full amount on the day they were paid in, in the pass book, and also in the books of the bank, to the credit of the customer, as "bills" (not as "cash"), and after such entry, the customer was at liberty to draw to the full amount, by checks, and the bankers became insolvent, having in their possession several of the customer's bills so paid in, and the assignees having converted the same to their use:—Held, that the customer (who had a cash balance in his favor at the time of the bankruptcy), might maintain trover against the latter for the amount, there being no evidence that he had, in point of fact, agreed that when the bills were paid in, they were to become the property of the bankers. *Semble* that a custom for bankers to use bills so deposited, by paying them away in the course of their banking business, is not good in point of law, and certainly cannot bind the customer without his express assent. A banker, however, may negotiate bills deposited by his customer, to such an extent as the necessary demands of the latter may require, without his express authority.

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for the plaintiffs, damages 2539*l.* 11*s.* 9*d.* subject to the opinion of the Court upon the following case:—

The plaintiffs are partners under the firm of *William Thompson* and *Co.* in a silk manufactory near *Lancaster*, and for many years past, have had a banking account with *Thomas Worswick*, *Sons* and *Co.* being the firm in which the bankrupts carried on the business of bankers prior to their failure. The defendants are the assignees of the bankrupts, duly chosen under a commission of bankrupt, which issued on the 15th *February*, 1822. The bills of exchange which are the subject of the present action, were received by the bankrupts as such bankers, prior to their bankruptcy, on the account of the plaintiffs, and were entered in the account in the manner after mentioned. They remained in the bankers hands till their bankruptcy, when they were taken possession of by the defendants, as assignees, and converted to their own use. The account of the plaintiffs with the firm of *Thomas Worswick*, *Sons* and *Co.* had continued for many years, and was kept in the following form in the pass book or banking book, and it was the course of dealing of the bank to keep the accounts in this form:—

Messrs. *W. Thompson* and *Co.* in account with *T. Worswick*, *Sons*, and *Co.*

Dr. Cr.

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1821. | | £ | s. | d. | 1821. | | £ | s. | d. |
| July 4 | To Bank | 81 | 11 | 0 | July 1 | By Balance | 1374 | 1 | 4 |
| 5 | Bank | 100 | 0 | 0 | 2 | Bills | 753 | 11 | 0 |
| 9 | Draft | 34 | 1 | 0 | 12 | Ditto | 564 | 1 | 5 |

At the end of every half-year, an account was sent in to the plaintiffs from the bankers. In an account delivered to the plaintiffs at *Christmas*, 1821, and also in the pass book,

a bill for 689*l*. 16*s*.; one of those in question in this action, was included, being one of the bills paid in on 10th *December*, 1821, and this formed part of the cash balance of 941*l*. 2*s*. 5*d*. therein stated. The mode of keeping the account with the plaintiffs and other customers of the bank, was this; when the customer paid bills into the bank, such as the bankers approved of, such bills were never written short, but entered on the day they were paid in, in the pass book, and also in the books of the bank, to the credit of the customer, in the form above-mentioned; and after such entry, the customer was at liberty to draw to the full amount appearing to his credit by checks on the bank. Bills disapproved of were not so entered, but were sometimes returned, sometimes deposited till due. All bills so entered, whether made specially payable to the customer or not, were indorsed by him, or if for any private reasons he did not wish his name to appear on the bills, a letter was given by him to the bank, acknowledging himself to be equally liable as if he had indorsed. An interest account was kept, not in the pass book, but in the bank books, in which the customer was debited with interest on each cash payment to him from the date of the payment, and on each payment in bills from the period when the bills were due and paid; and on the other hand, he had credit for the interest from the date of each cash payment by him, and from the period when each bill paid in by him, became due and was paid. As the accounts were balanced half-yearly, if a bill was paid in, which did not become due before the end of the half-year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass book. This was the usual and most convenient mode of keeping an interest account. If only the undue bills paid in by the plaintiffs were taken out of the account made up to 31st *December*, the plaintiffs' account at that date would appear to be over-drawn; but some of the payments made by the bankers to the plain-

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tiffs, were made in bills payable at future times, and some of these also were undue on 31st *December*; and if all the undue bills on both sides had been taken out of the account made up to 31st *December*, the plaintiffs would have been made creditors on that account. At the period of the bankruptcy, the cash balance was in favor of the plaintiffs, exclusive of the bills in question. It was proved to be the constant usage and course of dealing of this bank, and of others in the county of *Lancaster*, to use bills so paid in, by paying them away to their customers as they thought fit; that the bank of *Worswick* and *Co.* were in the habit of paying away such bills to their customers almost every day and hour, and to the amount of many thousands every week, and that the circulation of the town of *Lancaster*, and the county at large, was conducted in a great measure by bills so paid in and afterwards paid away by the bankers, and that if that was not done, each bank would require an immense unemployed capital of bank notes, or be obliged to draw on their correspondents in *London*, and thereby considerably increase their expences. This proof was objected to by the plaintiff's counsel, but was received, subject to the opinion of the Court as to its admissibility. No direct proof was given that the plaintiffs were acquainted with this practice, and the plaintiffs never received any thing from the bankers but cash, notes, and bills drawn by the bankers upon their *London* agents. When they sent bills on their account, which were unaccepted, which they frequently did, they occasionally gave directions to their bankers to forward them for acceptance. On one occasion of this sort, the bankers informed the plaintiff's clerk, who gave such a direction that it was unnecessary, as they always did so. The question for the opinion of the Court is, whether the plaintiffs are, under the circumstances, entitled to recover; if the Court shall be of opinion that the plaintiffs are so entitled, the verdict is to stand; if not, a nonsuit is to be entered.

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*F. Pollock*, for the plaintiffs, contended, that the bills in question having been lodged with the bankers in the character of agents, they could not pass to the assignees of the latter, and consequently this action was maintainable. From the mode in which the accounts were kept, it was quite obvious that neither the plaintiffs on the one hand, nor the bankers on the other, considered that the property in the bills became vested in the latter by the act of depositing them. The bills were not entered as *cash*, but as *bills*, and therefore from the mode of keeping the account, there was nothing which would prejudice the plaintiff's right to recover. The relation of customer and banker is simply that of principal and agent, and consequently bills of the former in the hands of the latter, remaining in specie, may be recovered, notwithstanding his bankruptcy. This was expressly decided in *Giles* v. *Perkins* (*a*). There was nothing in the usage stated in the case which could bind the plaintiffs, supposing by law such an usage could be sanctioned, because it did not appear that the plaintiffs were cognisant of or acquiesced in it. These bills were specifically deposited; the plaintiffs had never parted with their property in them, and therefore there was nothing to prevent their withdrawing them at any time from the hands of the bankers. At the period of the bankruptcy, the cash balance was in the plaintiffs' favor; but supposing the fact to have been otherwise, there was nothing to prevent the plaintiffs from demanding these specific bills, and if upon tendering any balance due, the bankers refused to deliver them, there was no doubt that trover would lie. If this were so, then there was an end to the question raised in this case. After citing *Zinck* v. *Walker* (*b*), *Ex parte Dumas* (*c*), *Bolton* v. *Fuller* (*d*), *Taylor* v. *Plumer* (*e*), and *Moore* v. *Bartrup* (*f*), he was stopped by the Court.

(*a*) 9 East, 12.
(*b*) 2 Sir W. Bl. 1154.
(*c*) 1 Atk. 232.
(*d*) 1 Bos. & Pul. 539.
(*e*) 3 M. & S. 575.
(*f*) Ante, vol. ii. 25.

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*Parke*, contrà. The case last cited does not apply, because it is clear that there the property in the check had never vested in the bankrupts, and therefore their assignees could have no title to sue. The question arising in this case is one of fact, and not of law. The facts are shortly these: These bills are paid by the customers into the hands of their bankers; the amount is placed in the column of cash in the accounts, and at the end of every half year an account is rendered, giving the customers credit for the full amount as cash. The case then states that it was the constant usage and course of dealing of this banking-house, and of others in the county of *Lancaster*, to pay away such bills to their customers as cash, and deal with them as their own property. The result then of these facts is, that the bills in question had, by the course of dealing between the parties, become the property of the bankrupts, and as a consequence of law they became the property of the defendants, their assignees. The principle which has governed this Court from Lord *Hardwicke's* time to the present is, that where bills are paid into a banker's hands, as to a mere agent, for a particular purpose, they do not pass to his assignees, because they are not subject to the operation of the statute of *James*; but that if they are remitted upon a general account existing between the banker and his customer, they are considered as items in that account, and the property in them vests in the assignees. This distinction was expressly recognised and enforced in the recent cases of *Ex parte Pease* (a) and *Ex parte Wakefield Bank* (b). [*Bayley*, J. They were not the ordinary cases of banker and customer.] It is said by the Lord Chancellor in *Ex parte Pease*, "It ought to be generally known," that if bills indorsed are remitted to bankers, they may dispose of them effectually, though contrary to the faith of the understanding between the parties, and the remitters can only come in as general creditors;" which is going farther than is necessary in this case, because here the understanding between the parties was, that the defendants might dispose of the bills as paid.

(a) 1 Rose, 232. (b) Id. 243.

The case of *Ex parte Oursell*(a), cited in *Ex parte Pease*, is to the same effect. [*Best*, J. There the bills had been actually paid, and the bankrupts did not sustain the character either of bankers or factors.] The bankrupts there were general agents, and that is enough for the present argument, which is, that the whole question here is one of fact, which that case decides it to be. In *Ex parte Sarjeant*(b) the rule is laid down when bills paid into a banker's hands are to be considered as items in the account, and when not; where the Lord Chancellor says, "If they (the bills) were there (in the hands of the bankrupts) with the petitioner's knowledge as cash, and he drawing, or entitled to draw upon them, as having that credit in cash, he would thereby be precluded from recurring to them specifically." [*Best*, J. That was a case of short bills, and the Lord Chancellor adds, that it lies upon the bankers to shew that they were treated as cash, and that the customer is entitled to them, "unless they have been carried to his credit as cash, with his knowledge or consent." Can it be said that the bills here were carried to the credit of the plaintiffs, with their knowledge or consent?] This class of cases is quoted, not as directly in point with the present, but to shew the application of the law to the facts here found, and as establishing this principle, that where the relation of debtor and creditor exists, the property does pass to the assignees, though where that of principal and agent exists, it does not. The same principle was laid down by Lord *Ellenborough* even in *Giles* v. *Perkins*(c), relied upon on the other side, where he says, "Every man who pays undue bills into his banker's, places them there as in the hands of his agent, to be received when due. If the banker discount the bill or advance money upon it, he then either acquires the entire property in it, or has a lien pro tanto." The result of all these cases is, that a question of fact is raised, and the Court therefore in this case are placed in the situation of a jury, and are called upon to answer a question of fact, which it is hardly com-

(a) Ambl. 297. (b) 1 Rose, 153. (c) 9 East, 12.

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petent for them to do. But if that question is to be discussed in so unusual a manner, there is one circumstance in the present case which distinguishes it from all others hitherto decided, namely, the adoption by the bankrupts of the custom, stated in the case to have been universal among the bankers in their neighbourhood, of using the bills paid in by their customers, day by day, as their own. [*Bayley*, J. Surely it is not meant to be argued that they used *the bills* as their own; such a custom would scarcely be consistent with honesty. Bankers, to act honestly, can, I apprehend, go no further than this; to treat every individual's bills as cash with reference to his account, and discount them for the purpose of adding the proceeds to his cash balance in their hands: they can have no right to treat them altogether as their own, or to convert them into cash at all, so long as the individual's cash account remains equal to his drafts upon them.] The usage is found by the case in very strong terms; it is said, " It was proved to be the constant usage and course of dealing of this bank, and of others in the county of *Lancaster*, *to use the bills so paid in, by paying them away to their customers, as they thought fit.*" [*Holroyd*, J. Is such a custom legal? If it be not, we cannot recognise or sanction it, and how can it be legal, or what right can accrue to the bankers from its adoption, unless the customer is acquainted with, and expressly consents to it, which does not appear to have been the fact here?] The custom is stated to be universal among the bankers in the district, and consequently must have been known to every mercantile man there; then if the customer pays in bills with that knowledge, he must be taken to give an implied assent at least to its adoption in his own case. [*Bayley*, J. It is not found that the customers of the bank were generally aware of the custom, and the fact must not be assumed; then what right could the bankers have to use the money of their customers, without their consent, for their own purposes?] The fact certainly is not found in express terms, but it is evidently assumed and implied by the whole

tenor of the case. No injury could arise to the customers from the usage, because if the bankers carried it to an improper or illegal extent, they would render themselves personally and criminally liable under the 52 *Geo.* 3. c. 63. s. 1. [*Holroyd*, J. But by sect. 2. the provisions of that statute are confined to money, bills, &c. placed in the hands of bankers, "with orders in writing, and signed by the parties who shall so deposit or place the same, to invest such money," &c. in some specified manner. This transaction therefore, and the relative situation of the parties, seem to me to stand precisely the same as if that statute had never passed.] If bankers are not authorized in acting upon this usage, the necessary consequence will be, that they must alter their whole course of dealing, and that must be the effect of such a decision, because the case finds, that without this usage, "each bank would require an immense unemployed capital of bank notes, or be obliged to draw on their correspondents in *London*, and thereby considerably increase their expences." From the universality of the usage, the consent of all the customers may be fairly implied. It is no question here whether such an usage be, or be not, strictly legal; the question is, whether the course of dealing between the parties was not such as to justify it, and to shew that they stood in the relative position of debtor and creditor. Now, *Bent* v. *Puller* (a), is an authority to shew that they did. It is there said by Lord *Kenyon*, "there must be either a bill pledged against a bill, or a transaction against a transaction; but here the bills were coming in day after day, not for the purpose of opposing a bill on one side of the account to another on the other, but all were paid on one general account. The plaintiffs therefore are not entitled to recover these bills, on the ground that the particular purpose for which they were deposited has not been answered, because it does not appear that they were deposited to answer that particular purpose." [*Bayley*, J. The cases are very distinguishable. The bankers in *Bent* v. *Puller* were justified in negotiating the bills by the state of the plaintiffs'

(a) 5 T. R. 494.

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account, on which they were their debtors, and the question there was, whether the bills were paid on a particular, or a general account.—*Best*, J. In *Bent* v. *Puller*, the plaintiffs would have been the debtors to the bankers, even if all the bills had turned out good, and the balance was against the plaintiffs at the time when the action was brought. In those particulars the present case is essentially distinguishable from that.] In *Zinck* v. *Walker* (*a*), the plaintiff was held entitled to recover, but that was upon a different ground from that now contended for, because that was held to be "the case of goods consigned to a factor." The cases from *Rose's* Reports all treat the question as one of fact, and not of law, and therefore the facts of this case must govern the Court, and lead to a decision in favor of the defendants. *Giles* v. *Perkins* (*b*), appears at first sight to lean rather the other way, but that is by no means a decisive authority, and seems considerably shaken by the later decisions. *Ex parte Pease* (*c*), decides, that writing a bill short is merely evidence; the act of writing it short is conclusive; the omitting to do it is equivocal; and *Ex parte Maddison*, decided in *Mich.* 1797, is there referred to as confirming the doctrine. At all events there is one bill to the amount of 689*l.*, which has been treated as cash, because in the half-yearly account the plaintiffs were charged with interest in respect of it, as if it were a discount transaction, and consequently the verdict ought to be reduced by deducting the amount of that bill. Admitting the bankers to be simply agents for the plaintiffs, yet if the latter consented that they might have the order and disposition of the bills as their own, the case would come within the intent and meaning of 21 *Jac.* 1. c. 19. s. 11, and the bills would pass to the defendants as assignees.

*F. Pollock* was not heard in reply.

BAYLEY, J.—If the propriety of the decision in *Giles* v. *Perkins* could be doubted, it would have been our duty to consider how far that decision ought to affect this particular

(*a*) 2 Sir W. Bl. 1154. (*b*) 9 East, 12. (*c*) 1 Rose, 232.

case. It cannot be disputed as a general principle, (which is the result of *Giles* v. *Perkins*) that property ought to go to the rightful owner, and not be taken from him in order to be applied to the purposes of other persons. There are cases under the bankrupt laws in which unfortunately, perhaps, this principle does not always prevail; but no man can deny its utility. I agree with Mr. *Parke* that to a considerable extent, this is to be considered more a question of fact than of law. But if the circumstances enable the Court to see without difficulty what conclusion a Jury would draw from the facts, I think the Court are at liberty to draw it on a special case, though they could not do so on special verdict. If we are satisfied that the bargain which it is said had been entered into between these parties, could not possibly have been acceded to by the plaintiffs, I think we are at liberty to draw the inference that such a bargain did not exist. It is said to have been agreed between the plaintiffs and the bankers, that as soon as the bills reached the banking house, the property in them was to cease in the former, and become absolutely vested in the latter. If such was the bargain, undoubtedly the result of this case would be different from that to which the Court must come, but we cannot say that that fact is established to our satisfaction. In judging whether this was the bargain or not, we are to look to the situation in which the customer would have stood if there had been no bargain whatever. The relation between customer and banker is similar to that of principal and factor. If bills of a principal in the hands of a factor remain the property of the former, so do those of a customer in the hands of a banker, unless there is a special bargain between the parties to the contrary. Upon the death or failure of a banker, his customer has a right to the bills as long as they remain in specie, and they do not go to his executors or administrators in the one case, or to his assignees in the other. It is hardly necessary to refer to cases establishing that position, but *Scott* v. *Surman* (a), *Bolton*

(a) Willes, 400.

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v. *Puller* (*a*), and several others, shew that to be the settled rule. The bargain contended for in this case is utterly inconsistent with the ordinary dealings and transactions of mankind. Nothing could be more unlikely than that a customer should enter into an agreement with his banker to waive all property or title to bills which he should pay into his hands. Certainly no reason can be suggested for so extraordinary and unusual an arrangement, and there is here no specific evidence of any such bargain between these parties. But it is said, that it results from the mode of dealing between them, and from the custom of this and other banking houses in the same neighbourhood. What is the mode of dealing between these parties? Certainly not to treat the bills paid in as cash. They are not entered as "cash," but as "bills." It is said, however, that the amount is carried on to the credit column, as if they were cash; and it is asked why have the plaintiffs credit to the full amount, except on the ground that they are to be treated as cash? This, it is insisted, is evidence of a consent on the part of the customer on the one hand, and of an agreement by the banker on the other, that they shall be so treated. I think that by no means follows. I understand the mode of keeping the accounts to be no more than this: the banker says to the customer, "looking at your account, I find you have bills in my hands to a certain amount, which I expect will be realized when due. I will give you credit for these different sums, and if you mean to draw checks upon me to that amount, I will answer them." It is no more than an assent on the part of the banker that he will give the customer credit in advance. I agree, that by indorsing some of the bills, and giving a guaranty for others, which he does not indorse, the customer may give the banker, as his agent, the power of discounting those bills, without an express authority for that purpose. If the banker bonâ fide discounted the bills with a third person, the indorsee would have a right to retain them; and in all cases, whether bills are paid in short, or placed to

(*a*) 1 Bos. & Pul. 539.

the credit of the customer to the whole amount, unless there is some restriction upon the banker, he has power to use the bills, and make them available in the hands of an innocent and bonâ fide indorsee. That is a risk which in many instances a customer is in the habit of running; but in my opinion, the state of these accounts produces no more than an agreement to this extent. "I, the customer, consent that you, the banker, shall be justified as between ourselves in negotiating my bills to any extent which my account, on the debit side, may make reasonable." For instance, suppose the customer has drawn bills on the banker, which are becoming due, and he has not cash in specie in the banker's hands to answer them, then the latter may pass away to a sufficient amount such of the customers bills as are in his possession; or if the customer is in the habit of drawing checks, payable on demand, without giving notice to the banker, why then the latter may have a further power of discounting or passing away such of the bills in his possession as may be proper and reasonable, in order to keep up the cash payments, which a customer in the habit of dealing in that manner, may require of his banker. To that extent such a course of dealing may make the banker an agent for the customer, so as to give him an indorsing power to that amount, and if the banker does in fact indorse, the customer will be bound, as between himself and an innocent indorsee, to pay the bills. Upon such a bargain as that, what would be the banker's honest rights? To negotiate such of the bills as the necessary demands of the customer require, and no more. It cannot be said that his right of discounting shall depend, not upon the necessities of the customer, but upon his own necessities. If the purposes of the customer require such a course of dealing, the bargain would be reasonable, prudent, and proper, but the instant it is resorted to for the purposes of the banker, it would become unreasonable, imprudent, and improper. I should, therefore, infer from the course of dealing between these parties, that such alone was the contract which sub-

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sisted between them. In this point of view, the usage stated in the case, is wholly inapplicable. It is stated to be the custom for bankers in this part of the country, to use the bills which are paid in by their respective customers. Had it been found that they were in the habit of using them for their own purposes without regard to the interests of their customers, and without the knowledge of the latter, I should have said, that it was a most unreasonable and unjust practice; but if it means no more than that they are in the habit of using such of the bills as the purposes of the customers make right and proper, then I should say that they have only exercised that authority which in common justice the customers would have allowed them to do. On looking to the different decisions which bear upon this subject, it appears to me, that the cases upon *Boldero's* bankruptcy (*a*) were not properly those of customer and banker, but country banker and principal; i. e. the country banker principal, and the *London* banker agent, which distinguishes that case from that of an ordinary customer, and an ordinary banker. *Ex parte Sarjeant*, which I believe was the case of ordinary customer and ordinary banker, certainly comes nearer; but there is a great difference between that case and this. As far as I can collect from the printed report, the bills were mixed with cash, and described in the accounts, not as "bills," but as "cash," and they are therefore in the account, as far as it goes, credited, not as bills, but as cash. In this case the credit is given for them, eo nomine as "bills," and therefore the whole account upon the face of it speaks what the nature of the credit was. *Ex parte Sarjeant* is a stronger case, as it seems to me, than the present; but does my Lord Chancellor treat that as a case in which it is clear that the property passes to the assignee, and that the customer has no right to have the bills restored? On the contrary, he considers it still a question of fact, and as far as we can collect his opinion, it seems that the result of that fact ought to be in favor of the customer. He says, "It is quite clear that short bills in the possession of

(*a*) *Ex parte Pease* and *Ex parte Wakefield Bank*, 1 Rose, 232. 243.

bankers, are to be considered as still remaining in the possession of the parties by their agents, to be specifically returned, and if these bills were written short, the petitioner could have compelled *Kensington* and *Co.* so to settle with *Burroughs* as not to break in upon his claim. That they were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash; if they were there, with the petitioner's knowledge, as cash, and he drawing or entitled to draw upon them, as having that credit in cash, he would thereby be precluded from recurring to them specifically; but it is upon them to prove that to be the case, and the petitioner is therefore entitled, unless they have been carried to his credit as cash, with his knowledge or consent." What is the fair inference from that? That if bills are paid in, not as bills, but as cash, still if there is a consent on the part of the petitioner, that they are to be considered as cash, the customer has a right to have the bills returned. Upon whom does the onus of proof lie? Upon the banker. It is his duty to shew that the bills had been paid in as cash, and therefore the onus would lie upon the bankers here, or their assignees. For the reasons I have stated, I am of opinion there is no foundation for assuming that there was any agreement between the parties that these bills should be considered as cash, because I think that a proposition to that effect on the part of bankers, would have been most unreasonable, and I think it would have been most imprudent on the part of the customer, to have acceded to such an arrangement. I am of opinion that we are not entitled to consider these bills as properly cash, but that we are to consider them still as specific bills, which the plaintiffs are entitled to recover in this action. Mr. *Parke* has endeavoured to make a distinction between one of the bills; but it seems to me, that that stands precisely on the same footing with the others, and that all the bills which were in specie, in the hands of the bankers at the time of the bankruptcy, remained the property of the customer.

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HOLROYD, J.—I am also of opinion, that under the circumstances stated in this case, the property in these bills did not pass to the bankers, and consequently that the defendants, as their assignees, have no answer to this action, on the ground that the right of property remains in them. It is perfectly clear as a general rule, and has not been disputed, that a customer paying bills into the hands of his bankers, though he may expect to have his drafts paid to the amount, does not thereby effect such a change of property in the bills, as to vest it in the bankers, unless something more be done, clearly manifesting such an intention. Undoubtedly the banker may have a lien upon such bills, to the amount he may have paid upon the credit of them, but it lies upon these defendants to shew that such special circumstances existed as converted the property of the customer into that of the banker, or that there was such a conversion as would, under the statute 21 *Jac.* 1. c. 19. s. 11, vest it in the assignees. I think there is not sufficient stated in this case to shew that in law the property is so changed, or that there is any right in the assignees by reason of that statute. The case of *Giles* v. *Perkins* is an authority for saying, that if bills are paid to a banker, even though entered as cash, they do not pass to him; and *Ex parte Sarjeant* is to the same effect. Though entered as cash, it is not to be supposed that the bankers meant to debit themselves to the full amount, as upon a cash transaction, when the bills were not to become due until a future time, particularly if interest was payable. The circumstances must be such as to shew that the bankers had bought the bills, either by discounting them for their customer, or by some other effectual mode of transfer. Here they are in the first instance entered as bills, not as cash; but even if they were entered as cash, still that circumstance would be open to explanation (as in the case of *Giles* v. *Perkins*, which I think was rightly decided), and it might be shewn that they are not cash. If these bills were intended to have been entered as cash, the entry would not have been for the whole amount, but for the amount, minus the discount,

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This circumstance shews clearly, that they were not credited for as cash. It seems to me, that the case comes directly within the principle of *Giles* v. *Perkins,* and is, indeed, not so strong, because there the bills were entered as cash, but here they were entered as bills. Assuming, therefore, that the evidence of the usage among other bankers in the county of *Lancaster,* was admissible, still it would not alter the present case. Supposing this to be a question of fact, and not of law, still I am of opinion that the facts stated in the case, are not sufficient in law to change the property from the plaintiffs to the defendants. I doubt even whether there is sufficient here to make it a question of fact for the Jury.

BEST, J.—I concur entirely with my learned Brothers in the opinion they have pronounced. It is clear, that if a person deposits in his banker's hands bills that are not become due, the property in them remains in the party so depositing them, and that if they were by any accident burnt or otherwise destroyed, without any fault of the banker, the loss would not fall upon the latter, but upon the former. The Lord Chancellor considered that to be the law in the case *Ex parte Sarjeant.* If then the property be not changed when bills are placed, under such circumstances, in the hands of the banker, can it be said that they would pass to his assignees in the event of bankruptcy, by the statute 21 *Jac.* 1. c. 19. s. 11? Certainly not; because it must be known to every body who sees them in the hands of the banker, that they are in his hands merely as agent for the purpose of receiving the money due upon them. He cannot be said to have the "order and disposition" of them, and therefore under that statute, they would not pass to his creditors. But though the general rule is that which I have stated, yet bills may be paid by a customer to his banker, under such circumstances as would furnish evidence of a transfer of the property; and the question has here been very properly treated as one of fact, whether there are in this case such circumstances as shew a transfer of the pro-

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perty in these bills. This case is not mainly distinguishable, in my opinion, from *Giles* v. *Perkins*. I am not aware of any fact existing in the present case, which is not to be found in that, with the exception of the custom which is stated to have existed amongst the bankers of the county of *Lancaster*. Even if that custom can be good in point of law, (of which I entertain very great doubt), I confess it seems to me that it is not evidence in this case. If it could be evidence against the plaintiffs, what would be the consequences? A perfect stranger to the county of *Lancaster*, deposits with a banker there, bills, perhaps to the amount of ten thousand pounds, which have not run the full time, and the banker is to be at liberty by the custom to pay them away for his own purposes. If he pays them away for valuable consideration, and a bankruptcy ensues, the customer is not only to get nothing from the person from whom he receives the bills, but he is to pay the whole amount to the creditors of the banker. That I think is a most unreasonable custom, and I certainly doubt its legality. But supposing it to be a good custom, it seems to me that it could have no weight in this case, because, whatever may be the mode of dealing between the bankers and other persons, that cannot affect the property of these plaintiffs. Their property can only be affected by their own dealings. Whatever has been done by others therefore, ought not to be received in evidence against them. The only question here is, what were the dealings between these plaintiffs and the bankers, and whether the plaintiffs did in fact consent that the bankers should have a right to use the bills in the manner they have? That is the only question which could with propriety be submitted to a Jury. No inference could be raised against the plaintiffs, except from their own acts and expressions. It is not pretended that in this case any expressions fell from the plaintiffs, shewing that they had consented to any such use of their bills. If they did not consent to such an use of them, then it appears to me that this case is precisely like *Giles* v. *Perkins*. The practice alluded to may be very convenient to the banker, but is pregnant with many

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very serious consequences to the customer. The former runs no risk, whereas the latter runs all the risk, and the danger is all on his side. The 52 *Geo.* 3. c. 63, I think furnishes a very strong argument against the defendants. It is not necessary for us to decide whether these bankers have brought themselves within the penal consequences of that act of parliament, by having abused the trust reposed in them as to these bills; but I say this much, that when a statute has declared, that a banker is guilty of a transportable felony who uses bills as his own, which are deposited with him at short dates for the purposes of receiving money upon them for his customer, it shews the opinion of the legislature to be, that the custom or practice here spoken of is not to be endured. I am of opinion that there is nothing in this case to shew an assent on the part of the plaintiffs, to transfer the property in these bills, and as they still exist in specie, the plaintiffs have a right to recover them back.

Postea to the plaintiffs.

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Smith and Another, Assignees of Sampson, a Bankrupt, *v.* Watson and Another.

Where a merchant employed a broker to purchase goods on speculation, and agreed verbally to allow him a certain portion of the profits on the sale, as a remuneration for his trouble: Held, that the broker could not be considered such a partner with the merchant, as to vest in him a property in goods so purchased, or in the proceeds thereof, as against the assignees of the latter after he became bankrupt, although as to third persons he might have been liable as partner.

A dormant partner is within the intent and meaning of the stat. 21 *Jac.* 1. c. 19. s. 11.

THIS was an action of assumpsit for money lent and advanced, money had and received, and upon an account stated by and between the bankrupt and the defendants before the bankruptcy. The declaration contained another count upon an account stated between the plaintiffs as assignees, and the defendants. Plea, non-assumpserunt, and issue thereon. At the trial, before *Bayley*, J., at the last *Yorkshire* Assizes, the case for the plaintiffs was this:— In the years 1822 and 1823, *Sampson*, the bankrupt, carried

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on business as a merchant at *Hull*, under the firm of *George Holden* and Co. The defendants were bankers in the same town, with whom the bankrupt kept cash. On the 22d *January*, 1823, the bankrupt paid into the defendants' hands a bill of exchange for 1689*l.*, drawn by him on the same day upon a person named *Le Cointe*, (but not then accepted) payable two months after date. For the amount of the bill the defendants gave the bankrupt credit in his account, and they afterwards received payment of it from the acceptor. The bankrupt committed an act of bankruptcy on the 28th *January*, and a commission issued against him on the 3st *February* following, under which the plaintiffs were declared assignees. At the time of the bankruptcy, there was a balance in the defendants' hands in favor of the bankrupt, as appeared by their pass book, amounting to 493*l.* upon the supposition that the whole produce of the bill belonged to him. On the 12th *May*, 1823, one *George Gill* claimed this balance of the defendants, on the ground that he was a partner with the bankrupt in the transaction for which the bill was given, and upon his giving them an indemnity, they paid him the money. Under these circumstances the action was brought. On the part of the defendants the case was, that they were justified in paying over the money to *Gill*, inasmuch as he was a partner with the bankrupt in a quantity of whalebone, bought on speculation, for their joint account, and sold to *Le Cointe*, who had accepted and paid the bill in question as the price thereof. It appeared in evidence that in the month of *August*, 1822, a verbal agreement was entered into between *Sampson* and *Gill*, that the latter should purchase whalebone for the former as his broker, and that for his trouble he was to receive one-fourth share of the profits arising from each transaction, and bear one-eighth share of the losses, if any should arise. Various quantities of whalebone were bought and sold under this agreement, from which considerable profit was derived, and shared with *Gill* in the proportion agreed upon. This agreement, however, did not extend beyond 1822, and all the transactions under

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it were closed in that year. In 1823 *Sampson* entered into other speculations of the like kind on his own account, but continued to employ *Gill* as his broker, paying him, by agreement, for his trouble, one-third of the profits; but there was no evidence that he was to bear any share of the losses, if any should arise upon these speculations. Some letters were given in evidence written by *Sampson* to *Gill* upon the subject of this speculation, in which the former appeared to have addressed the latter in the character of broker, and not in any way as partner; and several witnesses proved that *Gill* was always employed in these transactions as a broker, and that *Sampson* constantly mentioned him as his agent. It also appeared that the whalebone was always bought in the name of *Sampson*, the name of *Gill* not being in any way used, except as broker. When *Sampson* paid the bill in question into the hands of the defendants, he stated to them that it was drawn upon *Le Cointe* on account of whalebone sold to that person. No banking account appeared to have been kept by *Gill* with the defendants, and the only account kept by *Sampson* with them was, that in the name of *George Holden* and Co. in which name he traded as a merchant. When the bill was presented to *Le Cointe* for acceptance the whalebone was not delivered, and on that account he refused to accept; but the whalebone being delivered on the 8th *February*, he then accepted, and on that day *Gill* gave defendants notice that he was interested in the proceeds of the bill. Subsequently to the deposit of the bill by *Sampson*, the defendants made several payments on his account, under the name of *Holden* and *Co.*, and until the bill was honored the cash balance was against him. Under these circumstances two points were made at the trial; first, whether *Gill* could be considered as a partner in the transaction in question beyond his liability to third persons; and, second, whether, admitting him to be a secret partner, his share in the proceeds of the bill did not pass under 21 *Jac.* 1. c. 19, to the assignees of *Sampson*, who, at the time of his bank-

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ruptcy, had the order and disposition thereof with *Gill's* consent. The learned Judge saved both points, and the plaintiff had a verdict, with liberty to the defendants to move to enter a nonsuit.

*Tindal,* in *Michaelmas* Term, moved accordingly, and the Court having granted a rule nisi,

*Brougham* (with whom were *Parke* and *E. Alderson*) now shewed cause. It is perfectly clear from the evidence in this case that *Gill* was not a partner in this transaction; he was simply broker, and in all the whalebone speculations from first to last the name of *Sampson* only was used. It is true that he was to be remunerated by a share in the profits; but that circumstance would not make him a partner as between himself and *Sampson*. Probably, as between him and third persons, he might be liable in respect of any claims arising out of the transaction in which he had been employed by *Sampson;* but he was clearly not a partner in the whalebone for which the bill in question was given. Under the agreement in 1822 he was to share profit and loss in certain proportions; but that was not so in the subsequent transactions. In those he was merely to be paid by a share of the profits, as a mode of remunerating him as broker. The letters which were given in evidence treated him simply as broker, and nothing could be more unlike a partner than the character in which he was there spoken of. The question of partnership therefore hardly arises in this case. But conceding, for the sake of argument, that he was a partner in the transaction in question, still he was no more than a secret partner, and therefore, as he allowed *Sampson* to have the order and disposition of his share of the speculation up to the time of *Sampson's* bankruptcy, the whole proceeds passed to the assignees of the latter by virtue of the statute of 21 *Jac.* 1. c. 19. s. 11. Throughout this transaction there is nothing to indicate that *Gill* had any interest or share in the whalebone for which the bill in ques-

tion was given. He is wholly unknown in the business; his name does not appear to be connected in any way with the 1689*l.* bill; the bankrupt has the sole order and disposition of it, and it is paid by him into the hands of his private bankers, who place the whole amount to his credit. The bill did not even pass through the hands of *Gill*, and therefore assuming him to have a property in the whalebone for which it was purchased, or entitled to a share of the proceeds, still he stands in the situation of a secret partner, who allows *Sampson* to have the order and disposition of the whole as sole owner, and consequently the whole passes to the assignees (*a*).

The COURT stopped him, and called upon

*Tindal*, in support of the rule. There are two questions in this case, first, whether *Gill* was in fact partner with *Sampson* in the transaction in question; and, second, whether, assuming him to be so, he had a right to follow the proceeds of the bill in the hands of the defendants, notwithstanding *Sampson's* bankruptcy. Now, in the first place, it appears from all the evidence in the case that *Gill* must be considered as a partner. According to the agreement first entered into, he was to share both profit and loss, and therefore if the case stood there he would be a partner beyond all doubt. Under the second agreement he was to have one-third share of the profits: it does not appear that he was to participate in any losses, but that makes no difference, because here he was to share a specific proportion of the profits, and there are authorities for saying that this would make him a partner. It has been held, that an agreement not to share losses does not prevent persons from being partners. A joint concern in profit and loss, or any contract to share profits, will make persons partners. *Hesketh* v. *Blanchard* (*b*), *Waugh* v. *Carver* (*c*), *Gouthwaite* v. *Duck-*

(*a*) Vide *In re Gilpin*, ante, 636. (*b*) 4 East, 144. (*c*) 2 H. Bl. 235.

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*worth* (a). In *Ex parte Rowlandson* (b) the Lord Chancellor says, it is settled "that if a man, as a reward for his labor, chuses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it." If the agreement in this case had been, that *Gill's* profits were to depend upon the sale of whalebone above a certain sum, then, according to a class of decided cases he would not be a partner as to third persons (c). In *Ex parte Hamper* (d), it is laid down, that if a trader agrees to pay another for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, *as profits*, he is a partner. Now here *Gill* had a specific interest in the profits of this whalebone as profits, and therefore he is to be considered a partner. The case of *Meyer* v. *Sharp* (e) might be urged as an authority to shew that here there is no partnership, but that case is distinguishable from this, because there the bankrupt swore that the whole property was his own, although the broker was to receive remuneration from the profits of the adventure. Here *Gill*, by the terms of the agreement, was to have a share of the profits of the concern, and being jointly interested with *Sampson*, he is à multo fortiori to be considered a partner. There is nothing in the evidence to shew that *Sampson* had the sole property in the whalebone; the presumption is the other way, as the terms of the agreement import, and therefore *Gill* would not only be liable to third persons in case of any loss, but would, as a consequence, be jointly interested in the whalebone, in respect of which his legal liability would arise. If then *Gill* can be considered as a partner in this speculation, then the second question is, whether he

(a) 12 East, 421.

(b) 1 Rose B. C. 91. See 17 Ves. 404. and 4 B. & A. 663.

(c) *Benjamin* v. *Porteus*, 2 H. Bl. 590, and *Dry* v. *Boswell*, 1 Campb. 329.

(d) 17 Ves. 403.

(e) 5 Taunt. 74.

is entitled to his share of the proceeds of the bill, notwithstanding *Sampson*'s bankruptcy. He clearly had a right to follow the proceeds of the bill, for this reason, that the bill existed in specie at the time of the act of bankruptcy, and *Gill* being jointly interested, he was entitled to share in the money produced from it. At the time of the bankruptcy the proceeds of the bill had not become mixed with the rest of *Sampson*'s banking account. On the contrary, at that time the bill was not even accepted, and the cash balance was against *Sampson* upon his general account. The bill was not accepted until the 8th *February*, and *Sampson* had become bankrupt on the 28th *January* preceding, and therefore the bill existed in specie when the bankruptcy took place, at which time both partners had a joint interest in it. The bill was drawn for a specific purpose, namely, in payment of a quantity of whalebone in which they were jointly interested, and therefore *Gill* had as much right to a part of the proceeds of the bill, as he had to a part of the whalebone itself. Undoubtedly, it must be admitted that *Gill* was a *secret* partner; that it was not known to the world that he was concerned in this speculation, and that the bill in question was never in fact in his hands. These circumstances alone create all the difficulty; for had he been publicly known as a partner, there is no doubt that he, as the solvent partner, might have taken the whole proceeds of the bill as partnership property (*a*). But it is submitted, that these circumstances do not prevent *Gill* from recovering his share of the proceeds, because this is not a case within the operation of 21 *Jac.* 1. c. 19. s. 11. This case is distinguishable from *Kirkley* v. *Hodgson* (*b*), and *Gilpin*'s case (*c*). In the former the bankrupt was, by express agreement, allowed to continue in the possession of the whole ship as apparent owner; and in the latter, after the partnership was dissolved, the bankrupt was allowed to remain in possession for two years, of the dor-

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(*a*) See Cowp. 418. 1 East, 363. 2nd Id. 803.

(*b*) Ante, vol. ii. 818.

(*c*) Ante, 636.

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mant partner's share of the effects. [Here the partnership continued until the bankruptcy, at which time the bill remained in specie, and the bankrupt had only such a possession as was necessarily incident to the nature of the partnership. Notice is given by *Gilpin* to the defendants, before the bill is due, that he is jointly interested in the proceeds, and he does every thing to notify his title to the bill as partner. It has never yet been expressly decided, that a dormant partner is not within the exception of the statute of *James*, and there seems no good reason why he should not be excepted. According to the case of *Caldwell* v. *Gregory* (a), a secret partner is not within the operation of that statute. [*Bayley*, J. That case is over-ruled. Great respect is due to the opinion of the Lord Chief Baron, who concurred in that decision but acting upon the impression made on my own mind when *Gilpin's* case was before us, I cannot say that that case is law. On the contrary, I think it is not.—*Best*, J. That case was under our consideration in *Gilpin's* case, and I signed the certificate in that, upon a conviction that *Caldwell* v. *Gregory* was not rightly decided.]

BAYLEY, J.—I think, when this case is properly considered, no difficulty will be found in it. These defendants were the bankers and agents of *Sampson*, who carried on trade under the firm of *George Holden & Co.*, and for all property which came into their hands from him, they were primâ facie bound to account to him before his bankruptcy, and after that event took place, to account to his assignees. After *Sampson* became a bankrupt, instead of accounting for the proceeds of the bill in question, they pay over part of the money to *Gill*. Then it is incumbent on them to shew that they were justified in making that payment, it being an indisputable proposition, that when an agent disposes of the property of his principal, it lies upon him to shew that he had authority for so doing. These defendants say they were justified in making that payment, because,

(a) 1 Price, 119.

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though the money was, at the period in question, in their hands, in the name of *Sampson* alone, it was not in fact his separate property, but was the joint property of himself and *Gill*, being money arising from a bill drawn by *Sampson* in respect of some whalebone which belonged to both. If the whalebone had been bought in the names of *Sampson* and *Gill*, I should have acceded to the proposition, that it might have been considered the joint property of those two persons, and that these defendants were justified in paying the proceeds to *Gill*; but there is no evidence in the case to shew that it was bought in the names of *Sampson* and *Gill*, or that *Gill* was in any respect mentioned as being the proprietor, or had any interest whatever in the goods. If my agent takes upon himself to hand over my property to another person, he is to make out a title in that person, and the onus of proof lies upon him. But independently of that, and if even these defendants were not to be considered as agents for *Sampson*, I should say that in this case there was no evidence whatever to shew that this was the joint property of *Sampson* and *Gill*. It is said that we ought to assume, and that the proper conclusion which the jury ought to have drawn from the evidence in the case was, that *Gill* was a partner with *Sampson* in this whalebone. I think, however, that the contrary is the proper inference. The witnesses called on the part of the defendants, all spoke of *Gill* as being a broker, to be paid in a particular way, namely, by a share of the profits. Under the first agreement he was liable to contribute in a certain proportion, in case there should be any loss. It did not distinctly appear whether, under the second, he was to bear any proportion of loss; I will assume that he was, but still, though a right to share in the profit or loss upon a particular adventure, might make him liable to third persons as a partner in respect of such adventure, yet I think upon the bargain between these parties it never could have been the understanding that *Gill* was to have any

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ownership in this property ab initio? If not, he had no right whatever to come in and lay his hands on any part of the proceeds of this bill. Considering the case in that point of view, the question under the statute 21 *Jac.* 1. does not in any respect arise; but supposing it did, I entertain a very strong opinion that this case is within the intent and meaning of that statute. Here is a bill of exchange drawn in respect of certain goods, and it is paid by *Sampson* into the hands of his own bankers, upon his own general account, and to be applied by them to those purposes for which he, in his general character of a merchant, may want it. There is nothing upon earth to shew that it had any thing to do with property in whalebone, or that it had reference to any transaction in which *Gill*, either as a broker, or as a partner, had any interest. But if *Gill* was a partner in this transaction, it is quite clear upon the evidence that there is no ground for assuming that he was any thing but a secret partner. If, therefore, he was a secret partner, and suffered *Sampson* to be held out to the world as if he were the only person who had any interest in the concern, in my opinion the case falls within the operation of the statute, and the property passes to the assignees. My opinion is, that if a secret partner suffers the visible partner to appear to all the world as the sole partner, and to have the order and disposition of all the partnership property, the visible partner is to be considered as if he really was that which he appears to be. The object of the legislature in passing the statute of *James* was to declare that that which is suffered to appear to be a sole ownership, shall be taken to be really that which it seems to be, as against him who is instrumental to such appearance. If I consent that A. shall appear to the world as sole proprietor of property, in which I have an interest, and I allow him thereby to obtain credit, I am not at liberty in case he becomes a bankrupt to deny that which I have affirmed by my own conduct. It appears to me, however, that there is no foundation for saying in

this case that *Gill* was a partner in this transaction; but if he was a partner, he was a secret partner only, and having consented that *Sampson*, in the name of *G. Holden* and *Co.*, should appear to the world as the only person interested in the property, I think the verdict for the plaintiffs was properly found, and that this rule must be discharged.

HOLROYD, J.—Both the points raised in argument appear to me to be clearly against the defendants. First, no part of the whalebone ever belonged to *Gill*; the whole was originally, and remained, down to the time of the bankruptcy, the sole and separate property of *Sampson*. It appears from the evidence that *Gill* was a mere broker, and was concerned merely as such in the transaction; he therefore never had any claim upon the goods as a partner. He may have rendered himself liable to others as a partner in the speculation, but he never acquired any partnership rights as against *Sampson*, because the goods were always the separate property of *Sampson*, and the right of disposing of them, and of receiving and ordering the proceeds, was always vested in him exclusively. Secondly, assuming that *Gill* was interested in the property, it is quite clear from the evidence that it was as a secret partner only; for *Sampson* always appeared to the world as sole owner, and *Gill* had no concern whatever with the firm under which he carried on business. Then if *Gill* was a secret partner, permitting property of which he was the true owner to remain in the disposition of *Sampson* as apparent owner, the statute of *James* most expressly applies, and the property is distributable under the commission of bankrupt sued out against *Sampson*.

BEST, J.—There are two questions in this case; first, whether *Gill* and *Sampson* had a joint interest in the property of which the money now in dispute, forms part of the proceeds; and, second, if they had, whether that money

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does, or does not by law, pass notwithstanding, to the assignees of *Sampson*. If the first of these questions can be answered in the negative, the second does not arise, and it seems to me that none but a negative answer can be given to the first. It is perfectly plain that a man may, under various circumstances, and by various acts of his own, incur all the liabilities, without acquiring the rights of a partner. Had *Gill* any ostensible or avowed interest in these speculations? Certainly not: he was employed in them merely as a broker, and according to all the evidence in the case, held himself out to the world always as the broker, and never as the partner of *Sampson*. The latter therefore had always a right of action, either against the defendants as his bankers, or *Gill* as his broker, for any of the proceeds that might get into the hands of either of those parties; and if so, the same right of action has by his bankruptcy passed to his assignees. But if *Gill* had any interest, it was that of a secret partner only, and therefore the statute of *James* comes into operation. That was decided only a very few days since in the case of *Ex parte Gilpin* (a), in the course of which the case of *Caldwell* v. *Gregory* (b), was fully considered, and was determined by this Court not to be law. We are fortified in our opinion that *Caldwell* v. *Gregory* was erroneously decided, and that these are all cases in which the property passes to the assignees by virtue of the statute of *James*, by the authority of *Ex parte Dyster* (c), where the present Lord Chancellor in pretty strong terms expressed himself as of that same opinion, and refused to recognise the case as law. I confess it appears to me that if we were to follow up the decision in *Caldwell* v. *Gregory*, we should in effect repeal the statute, for the case of a secret partnership, like the present, involves in my opinion all the mischief which it is the express object of the statute to prevent. The man who is the sole ostensible trader, and the apparent owner of the

(a) Ante, 636. (b) 1 Price, 119. (c) 2 Rose's B. C. 256. 349.

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property, is enabled to obtain credit as such, and when he fails, a secret partner is to step in to claim the property as his, and to leave the creditors without a shilling. This is enabling the bankrupt to obtain a false credit, and brings the case most completely within the letter and the spirit of the statute. For these reasons, I am of opinion that the verdict for the plaintiff was right, and that we are bound to discharge this rule.

Rule discharged (*a*).

(*a*) A similar decision took place in another case between the same parties, and arising out of a transaction of the same kind.

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Between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and the Honorable CHARLES CECIL POPE JENKINSON, the Honorable HENRY KING, the Reverend JOHN MITCHEL, JOHN CUTHBERTSON, MARIA BARNARD, ALEXANDER HUME EVELYN, JOHN BYDE, GEORGE BARNARD, CHARLES MURTHWAITE, and HENRY WOODCOCK, Defendants;

And between GEORGE BARNARD, an Infant, by FREDERICK AUGUSTA BARNARD, his Grandfather and next Friend, Plaintiff; and ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, MARIA BARNARD, FRANCIS LIND, JOHN HUDSON MAY, JOHN CUTHBERTSON, CHARLES MURTHWAITE, ALEXANDER EVELYN, JOHN BYDE, HENRY WOODCOCK, the Honorable CHARLES CECIL POPE JENKINSON, the Honorable HENRY KING, and the Reverend JOHN MITCHEL, Defendants;

And between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and the Honorable CHARLES CECIL POPE JENKINSON, and Sir HERBERT TAYLOR, Defendants;

And between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and GEORGE IRTON MURTHWAITE, and JANE CUTHBERTSON, Defendants.

*T. M.* by will gave, devised, and bequeathed to three trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects

THE following case was sent by the Lord Chancellor for the opinion of this Court:—

*Thomas Murthwaite*, late of *Smallberry Green*, within the parish of *Isleworth*, in the county of *Middlesex*, Esq.,

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the testator hereinafter named, was, at the times of making his will, and of his death, seised in fee-simple of freehold tenements, and seised in fee-simple of some copyhold tenements, which he duly surrendered to the use of his will; and was also possessed of several leasehold estates for years, and of other personal estate of different descriptions, to a very considerable amount. And the said *Thomas Murthwaite* duly made and executed his last will and testament, in writing, bearing date the 29th of *December*, 1806, and which was duly executed and attested, so as to pass freehold estates, and was as follows:—"I give, devise, and bequeath

whatsoever and wheresoever, in trust to pay thereout several legacies and annuities, and for other the purposes in his will mentioned. He then gave legacies and annuities to a considerable amount, and directed that the annuities should be payable out of his 26,400*l.* three per cent. consols. The case found, that a large surplus of the personal estate remained after paying the debts, legacies, and annuities; but did not find that the legacies were really paid or that the annuitants were either satisfied, or dead. He then devised as follows:—"All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to at the time of my decease, I do give, devise, and bequeath unto my three nieces *E. M.*, *M. M.*, and *C. M.*, equally to be divided among them, *share and share alike, for and during the term of their natural lives*. And from and after the decease of them, or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, &c. *for life in like manner*. And if either of my nieces shall happen to die in the life-time of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid shall go to and be shared and divided equally between the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate for and during the term of her natural life. And from and after her decease the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint-tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then, from and after the decease of the survivor of them without issue as aforesaid, I give the whole of such residue to my next male heir of the name of *M.*, to hold to him, his heirs, executors, and administrators, in manner aforesaid." Two of the trustees were dead; all the nieces were living: two of them had no children, the other had one child, a son, *G. B.*, and it being a question what estate these parties severally and respectively took under the will, it was held, 1st. That the surviving trustee now has a fee-simple in the freehold and an absolute interest in the leasehold estates. 2d. That the testator's three nieces took no legal estate under the will. 3d. That *G. B.* took no estate under the will. 4th. That in case the will had commenced with the words, "all the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold. 5th. That *G. B.* would now have no estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them should have any other child, he will be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the life-time of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate.

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to Mrs. *Margaret Murthwaite*, of *Twickenham*, in the county of *Middlesex*, widow, Mr. *John Cuthbertson*, of *Poland Street*, in the said county of *Middlesex*, and to Mr. *John Janes*, of the *Inner Temple*, *London*, gentleman, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every my freehold, copyhold, and leasehold estate, and my personal estate and effects whatsoever and wheresoever situate, lying, and being, whether the same consists in mortgage, money in the public stocks or funds, bonds, notes of hand, or other securities, and all other my real and personal estate and effects of what nature or kind soever, not hereinafter by me specifically bequeathed, upon the trusts, and to and for the uses, ends, intents, and purposes hereinafter expressed, mentioned, and declared, of and concerning the same; that is to say, in trust to pay thereout the several legacies and annuities herein by me given and bequeathed, and for other the purposes in this my will mentioned." Annuities were then given by the testator to several persons for their respective lives amounting to the sum of 440*l.* per annum:—"All which before mentioned annuities I hereby will, order, and direct, shall be chargeable upon and payable out of my 26,400*l.* three per cent. Consolidated Bank Annuities, or such sum as may be standing in that fund in my name at the time of my decease." After bequeathing legacies to different persons, to a considerable amount, the testator then proceeded to devise as follows:—"All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or in any way entitled unto at the time of my decease, I do hereby give, devise, and bequeath unto my three nieces *Elizabeth Murthwaite*, *Maria Murthwaite*, and *Charlotte Murthwaite*, daughters of my late brother the Reverend *Peter Murthwaite*, late of *Ipsden*, in *Oxfordshire*, equally to be divided between them, share and share alike, for and during the term of their respective natural lives;

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subject, nevertheless, to such provision as is hereinafter provided touching and concerning the house and premises now in my occupation. And from and after the decease of them, or either of them, it is my will and meaning, that the lawful issue of them, and each of them, shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits, for life, in like manner; and it is my further will and meaning, that if either of my said nieces shall happen to die in the life-time of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying, without issue as aforesaid, shall go to and be shared and divided equally between the survivors of my said nieces for their respective lives, and afterwards by the lawful issue of the survivors of my said nieces in like manner. And if all my said nieces and their issue, save one, shall die without issue lawfully begotten, then it is my will and meaning that such surviving niece shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of such residue and remainder of my estate and effects, for and during the term of her natural life; and from and after her decease, it is my further will and meaning, and I do hereby will, order, and direct, that the lawful issue of such surviving niece (if more than one) shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of all such residue of my estate and effects, equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part and parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint-tenants; and if but one, then to such only one, his or her heirs and assigns for ever; and to hold so much and such parts thereof as is and are copyhold, at the will of the lord or lords, lady or ladies of the manor or manors, of which the same are holden in like manner. And if all my said nieces shall die without issue, then, from and after the decease of the survivor of them,

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my said nieces without issue as aforesaid, I do hereby give, devise, and bequeath the whole of such residue and remainder of my estate and effects, as well real as personal, and as well freehold as copyhold, to my next male heir, of the name of *Murthwaite*; to hold to such male heir, his heirs, executors, and administrators as aforesaid." Then followed the disposition of the house in which the testator resided. After reciting that his house was leasehold, and that the said *Margaret Murthwaite*, and his three nieces, might not chuse to live together, or to occupy his house, he devised the same to them, or such of them, as should be living at his decease; but if it should happen that they did not agree to live together, he directed that the house and furniture should be sold, and disposed of by the trustees thereinbefore named, or the survivors; and that the money to arise by such sale should be divided equally amongst the said *Margaret Murthwaite*, and his said three nieces, or such of them as should be living at the time of his decease, and the lawful issue of them as should be dead, if any, for their use and benefit. The will concluded by appointing executors, and giving directions as to other matters not material to the question now raised. The testator died on the 23d *November*, 1808, without having revoked or altered the said will, and leaving his said three nieces, the plaintiff *Elizabeth Murthwaite*, the defendant *Maria Barnard*, then *Maria Murthwaite*, and the plaintiff *Charlotte Macpherson*, then *Charlotte Murthwaite*, and the said *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, him surviving. And the said testator left his said three nieces his heirs at law, and likewise his customary heirs. *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, proved the said will of the said testator. *Maria Barnard*, then *Maria Murthwaite*, some time in the year 1809, intermarried with *John Barnard*, but who departed this life on the 5th *October*, 1817, leaving *Maria*, his wife, him surviving; and there was issue of the said marriage between them only one child, namely, *George Barnard*. *John Janes*, one of the executors and trustees of the said testator, died

in the year 1814, leaving *Margaret Murthwaite* and *John Cuthbertson*, his co-executor and co-trustees, him surviving; and the said *Margaret Murthwaite* died some time in the year 1816, intestate, leaving the said *John Cuthbertson*, and also her said daughters, *Elizabeth Murthwaite, Maria Barnard*, and *Charlotte Macpherson*, her surviving. A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expences, and his debts, and the legacies and annuities bequeathed by him. The defendant, *George Irton Murthwaite*, would now be the next male heir of the said testator, of the name of *Murthwaite*, in case the said *Elizabeth Murthwaite, Charlotte Macpherson*, and *Maria Barnard*, were now dead without leaving issue. The questions, for the consideration of the Court, are,

First, what estate and interest the said *John Cuthbertson*, the surviving trustee, now has under the said will of the said testator, in the freehold and leasehold tenements respectively, devised and bequeathed unto the said *Margaret Murthwaite, John Cuthbertson*, and *John Janes*, as aforesaid.

Second, what estates the said testator's said three nieces, *Elizabeth Murthwaite, Maria Barnard*, and *Charlotte Macpherson*, respectively took under the said will of the said testator, in the said freehold and leasehold tenements respectively.

Third, whether the said *George Barnard* now has any and what estate in the said freehold and leasehold tenements respectively, and what estate he will have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, no other issue having been born; and in case the said *George Barnard* should now die, in the life-time of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively. And in case the Court shall be of opinion, that by the will, as above stated, the whole legal estate in fee-simple, in the said freehold

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tenements, and the absolute interest in the said leasehold tenements, is now vested in the said *John Cuthbertson*; then, in case the will had commenced with these words, "all the rents," &c., and the passage before these words had been omitted,

Fourth, what estate the said testator's three nieces, *Elizabeth Murthwaite, Maria Barnard,* and *Charlotte Macpherson,* would respectively have taken under the said will of the said testator, in the said freehold and leasehold tenements respectively; and

Fifth, whether the said *George Barnard* would now have any and what estate in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, no other issue having been born; and in case the said *George Barnard* should now die, in the life-time of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

*Tindal,* for *Elizabeth Murthwaite, John Macpherson,* and *Charlotte* his wife. To the first three questions proposed, the following answers may be given respectively, and assuming them to be correct, the last two will become unimportant. First, the surviving trustee, *John Cuthbertson,* has not now any estate under the will of the testator. Second, the three nieces took legal estates in tail, with cross-remainders in tail in the freehold, and absolute estates in the leasehold. Third, *George Barnard* has not now any estate either in the freehold or the leasehold, but if he survives his mother and his aunts, they leaving no other issue, and having had no other issue, he will take an estate tail in the whole freehold by descent from his mother. The clauses of the will which are material to the decision of the case, are four: first, the devise to the trustees; second, the charge of the annuities and legacies upon the money in the funds; third, the devise to the three nieces, and the provisions

made for various cases of survivorship; and fourth, the ultimate remainder over, in case of failure of issue of all the nieces. In considering the first question, the Court will minutely examine the terms of the devise to the trustees, though they will not wholly confine their attention to that clause. The words are large enough to comprehend both real and personal property; but the intent and object of them must be collected from a view of the whole will, and that appears to be merely to provide for the payment of legacies and debts. The trust is "to pay thereout (generally), the several legacies and annuities herein by me given and bequeathed," and the annuities are afterwards specifically directed to be paid out of the money in the funds. [*Abbott*, C. J. That direction applies to the annuities only; it does not seem to comprise all the bequests.] It shews that the testator intended that the bequests should be paid out of the personal property, and that the real property should not be so applied, unless the personal proved insufficient for that purpose. The devise includes no power to sell the real estate, and in the subsequent clauses devising the real estate, that is never treated as if it had been previously devised to the trustees. This intention is further supported by the fact stated in the case, that after payment of all the debts, legacies, and annuities, a large surplus of the personal property remains; and as the real property is not necessary to the full execution of the trust, there is no reason why the trustees should take any estate in that, and the Court therefore will act upon the general rule laid down in the recent case of *Doe* v. *Nicholls* (*a*), and will not permit the trustees to take any larger estate than is really requisite for the purposes of the trust. [*Bayley*, J. It is impossible, or at least extremely improbable, that the annuities can have been all paid; they are probably still a charge upon the estate, and it may be a question whether the real property should not remain in the trustees to meet that charge.] The importance of this first question merges in

(*a*) Ante, vol. ii. 480.

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that of the second, for if the Court shall decide that the nieces took an estate tail and not an estate for life, it is immaterial to the plaintiffs whether the trustees have any estate or not. Although the devise to them does not, in terms, convey the land and the money in the funds, still it is sufficient to carry both, because an indefinite devise of the rents of lands will pass the lands themselves, as it has also been decided, that an indefinite bequest of interest, or of dividends, will carry the principal. For these propositions, *Page* v. *Leapingwell* (a), *Stretch* v. *Watkins* (b), Lord *Chatham* v. *Dawe* (c), and *Butterfield* v. *Butterfield* (d), are authorities. It cannot be disputed on the other side, that the testator has given express estates for life to his three nieces, nor, that he has given the ultimate remainder over, only upon failure of their issue. The leading character of the will then evidently is, an anxiety that the estate should not go out of the families of the first takers, except upon failure of their issue, and when the Court have found the main intention of the testator, they will give effect to that, even at the expence of sacrificing some inferior object of the will. Then look at the language of this will. The estate is in the first instance given to the nieces, "equally to be divided between them, share and share alike, for and during the term of their respective natural lives." It must be conceded, that if the testator had stopped here, this would have been a devise to the nieces of estates for life only; but he does not stop here, but proceeds thus:—"after the death of them, or either of them, the lawful issue of them and each of them, shall have and enjoy his or her mother's share of such residue of such rents, &c. for life, in like manner." Now, reading this clause by itself, undoubtedly it gives the issue of the nieces an estate for life, as tenants in common, but that circumstance must not prevail against the predominant intention of the testator. The argument on the other side will be, that the issue take an estate tail, which is not sup-

(a) 18 Ves. 463.
(b) 1 Madd. 253.
(c) 6 Bro. P. C. 450.
(d) 1 Ves. sen. 133.

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ported by the words of the will, because the estate given to the issue is restricted by language as strong as that given to the nieces themselves. The use of the word "issue," coupled with the expression "his or her mother's share," plainly indicates that by *issue*, the testator meant *children*, and therefore there is no devise to the issue of the issue, nor any thing from which it is possible to imply an estate tail to them. Before the children can take an estate tail under this devise, the words "for life in like manner" must be expunged from it, and if that can be done, the words "for life" may with equal propriety be expunged from the devise to the nieces, and thus the devise to the children be annihilated. The testator then proceeds to clauses providing for different cross remainders under different contingencies, and first, in the event of the death of any one of the nieces. That clearly favors the present construction, and shews that the nieces were the object of the testator's bounty. The words "issue of the body lawfully begotten" there used, are clearly words of limitation, and not of purchase, applying to children living at the death of the niece; for if one niece had a child, which died in its mother's life-time, leaving a child, that child by the latter construction could take nothing which would be a result subversive of the testator's main and manifest intention. The next provision is in the event of the death of any two of the nieces, for that must be the meaning of the clause, as will clearly appear by the transposition of the words "save one," and by reading the passage thus; "if all my nieces, save one, and their issue, shall die," &c. The word "issue" in this clause must be construed to mean "indefinite descendants," for by any other construction, the argument already adduced with respect to the exclusion of a grand-child would be equally applicable here, and a result equally repugnant to the evident intention of the testator would ensue. [*Bayley*, J. His intention may perhaps be argued to be this; to devise to his nieces for life, remainder to their children for life, as tenants in common, remainder to the issue of

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the surviving niece in tail.] Then comes the clause providing for the event of the death of all the nieces, and giving the ultimate remainder over, which can mean only this, that the estate should go over upon the indefinite failure of issue of the nieces, and not before. This is evidently the chief and prevailing object of the testator, and that once made out, there are many authorities which will justify the Court in giving effect to that object, even though in so doing they sacrifice any subordinate intention which is inconsistent with it. This principle was established in *Robinson* v. *Robinson* (*a*), and was confirmed in *Doe* v. *Applin* (*b*). The latter is a case much in point with the present, and is a strong authority in favor of the claim set up by the nieces of the testator. The words of the devise there were, " to *W. Dimmock*, to hold to him during his natural life, and after his decease to and amongst his issue, and in default of issue," over; which the Court decided, gave an estate tail to *W. Dimmock*. The same rule of construction was also adopted in *Doe* v. *Smith* (*c*), where the words of devise were, " to *Mary Ascough* and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint-tenants; and in case my said daughter shall happen to die before twenty-one, or without leaving issue on her body lawfully begotten, then" over; and Lord *Kenyon*, at the close of his judgment says, " I admit that in this case the testator intended that his daughter *M. Ascough*, should only take an estate for her life, and that her children should take as purchasers; but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; now the latter intention cannot be carried into effect, unless *M. Ascough* takes an estate tail. In order, therefore to give effect to the testator's general intention, according to the fair construction of the will, *M. Ascough* must take an estate tail." Again, in *Doe, Cock* v. *Cooper* (*d*), where the words of devise

(*a*) 1 Burr. 38.
(*b*) 4 T. R. 82.
(*c*) 7 T. R. 531.
(*d*) 1 East, 229.

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were "to *Richard Cock* for the term only of his natural life, and after his death to his lawful issue, as tenants in common," the Court held, that for the purpose of giving effect to the general intention of the testator, *R. Cock* must take an estate tail. But *Shaw* v. *Weigh* (*a*), seems to approach still closer in principle to the present case, and if the clauses of this will are placed in juxta-position with the clauses of the will in that, they will be found almost to correspond. There the testator devised "to three trustees and the survivor of them, in trust for his two sisters *Anne Lunsford* and *Dorothy Evatt*, equally between them, during their natural lives, without committing any manner of waste; and if either of his sisters should happen to die, leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both the sisters should die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, then" over. That was a case in error from the Great Sessions in *Wales*, which Court had decided that the sisters of the testator, being the first takers, took an estate tail, with cross remainders. That decision was at first reversed by this Court, but was subsequently established by the House of Lords (*b*), and remains now unimpeached. [*Bayley*, J. Considerable doubt is thrown upon the authority of that case by *Willes*, C. J. in *Ginger* v. *White* (*c*).] Several subsequent decisions have fully confirmed the doctrine there laid down; and *Doe* v. *Halley* (*d*), *Wight* v. *Leigh* (*e*), *Barlow* v. *Salter* (*f*), and *Bennett* v. *Lord Tankerville* (*g*), may be mentioned as instances. The case of *Shaw* v. *Weigh*, is therefore an authority in point; for there the direction was, that "the issue were to take the mother's share," and

(*a*) 2 Stra. 798. Fitzgib. 7. 3 Bro. P. C. 120. S. C.

(*b*) Fitzgib. 7. 3 Bro. P. C. 120. S. C.

(*c*) Willes, 348.

(*d*) 8 T. R. 5.

(*e*) 15 Ves. 564.

(*f*) 17 Ves. 479.

(*g*) 19 Ves. 170.

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it was held, that "issue" did not mean children only. In that case also, the sisters' estate was to be without impeachment of waste, which imported an intention to give no more than a life estate, and yet the Court sacrificed that particular intent in favor of the general intent, that the estate was not to go over until failure of the sister's descendants. Never perhaps did two cases more exactly correspond than these. It is unnecessary to trouble the Court at any length as to the leasehold property, because the law respecting leasehold tenements, is now too clearly established to admit of argument. At one time (*a*), indeed, an opinion obtained, that if freehold and leasehold tenements were devised by the same clause, that party who first took an express estate tail in the freehold, took also an absolute estate in the leasehold, but that the same effect was not produced where the first estate tail was taken by implication. That opinion has, however, subsequently given ground to a sounder doctrine, and it now seems to be settled law, that the first taker of an estate tail in the freehold, whether by express words of devise, or by implication, takes also an absolute estate in the leasehold. *Chandless* v. *Price* (*b*), *Dawe* v. *Lord Chatham* (*c*), and *Crook* v. *De Vandes* (*d*). Thus, then, the answers suggested to the first two questions proposed, have been supported upon principle and by authorities; these being established, the answer suggested to the third question must necessarily follow, and it becomes unimportant, as respects the fourth and fifth questions, to enter into any discussion whatever.

*Campbell*, for *Maria Barnard*, one of the nieces. The only point which it is necessary to establish on behalf of this devisee is, that the nieces took an estate tail in the freehold tenements. The whole difficulty attending the construction of the will, is produced by the insertion of the words "for life" in the clause of devise to the issue, for, omitting those words, it is quite clear that the nieces would take an estate tail. It

(*a*) 3 P. Wms. 258.
(*b*) 3 Ves. 99.
(*c*) 6 Bro. P. C. 450.
(*d*) 9 Ves. 197.

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is a settled rule of law, that if one devise lands to *A. B.* for life, remainder to his *issue*, and, if he die without issue remainder over; *A. B.* shall take an estate tail; because, that is requisite to give effect to the general intention of the testator, that the ultimate remainder over shall not operate while there is any issue of *A. B.*, and to that general intention the testator's particular intention that *A. B.* shall take only a life estate, must be sacrificed. Now it is perfectly clear, that the general and main intention of this testator, was, that the estates should not go to the "next male heir of the name of *Murthwaite*," so long as there was any issue of the nieces, and the Court will give effect to that intention, by adopting the only method open to them, namely, the striking out the words "for life" in the devise to the nieces, and then reading the whole will as if they had never been inserted in it. Suppose the testator, by the use of these words, to have meant, not the quantum of estate that he devised, but the period of time during which each generation was to enjoy it; and the whole difficulty is removed. Such an intimation was quite unnecessary, and if it is also inconsistent with an estate clearly given, the words in which it is conveyed, may be rejected as repugnant. *Robinson* v. *Robinson* (a), and *Doe* v. *Stenlake* (b). In the former, the estate was expressly given "to *L. Hicks* for life, *and no longer*;" but the Court, upon the very principle now contended for, rejected those words, and held that he took an estate-tail. In the latter the devise was "to my daughter *P. C.* and her heirs during their lives," the daughter then having two children born; and it was held, that she took an estate of inheritance, Lord *Ellenborough* having during the argument inquired "what objection there could be to rejecting the latter words *during their lives*, which were repugnant to the devise to the daughter *and her heirs?*" and adding, in his judgment, that "the words *during their lives*, after the devise to the daughter and *her heirs*, is merely the expression of a man ignorant of the manner of describing

(a) 1 Burr. 38. (b) 12 East, 515.

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how the parties whom he meant to benefit would enjoy the property." There must be an estate tail implied, either in the nieces or in their children, and what is there upon the face of the will to shew that the testator intended to give an estate tail to the children rather than to the nieces? The effect of his language leans the other way. Issue, is primâ facie a word of limitation, and the language of the devise to the issue, being "that the lawful issue of them, and *each* of *them* (the nieces), shall have and enjoy his or her mother's share," affords a strong presumption that the testator used it as a word of limitation; and at any rate it lies upon those who contend that it is used as a word of purchase to shew a plain intent so to use it, in some other part of the will. [*Bayley*, J. The word "issue" has always been construed as a word of limitation, and not as a word of purchase, unless there is some designation of the individual to take.] But even admitting that there does appear a particular intent that the children should take as purchasers, still that must yield to the more manifest and predominant general intent, that the ultimate remainder should not operate until there was an indefinite failure of issue. Upon this point some additional authorities may be cited. In *Pierson* v. *Vickers* (*a*), the testator devised "unto his daughter *Ann*, and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common, and not as joint tenants, and in default of such issue," over; and it was held, that *Ann* took an estate tail. There are, indeed, two cases of a similar description, in which this Court came to an opposite decision; but they are not now authorities, having been since over-ruled. In *Doe* v. *Goff* (*b*), there was a devise "unto my daughter *Mary*, and to the heirs of her body lawfully begotten, or to be begotten, as tenants in common, and not as joint tenants; but if such issue should depart this life before he, she, or they, shall respectively attain their age or ages of twenty-one years, then," over: and it was held, that the daughter

(*a*) 5 East, 547. (*b*) 11 East, 668.

*Mary* took only an estate for life, with remainder to all her children equally as purchasers. Again in *Doe* v. *Jesson* (*a*), the devise was, "to *W.*, to hold for and during the term of his natural life," and after his decease, to the heirs of his body in such shares as he should appoint; and for want of such appointment "to the heirs of the body of the said *W.*, lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue, to my right heirs for ever:" and it was held, that *W.* took only an estate for life. Both these cases, however, were over-ruled when the latter went into the House of Lords (*b*), and the principle was there established, that where an estate is given expressly to an ancestor for life, remainder to his issue or the heirs of his body, and in default of such issue, remainder over to an ultimate devisee, there the ancestor shall take an estate tail.

*Littledale*, for *George Barnard*. The answer to the first question must be, that the surviving trustee now has an estate in fee-simple in the freehold, and an absolute estate in the leasehold tenements. Undoubtedly the personal property is charged with the annuities, and the case finds that the personal property is sufficient for the payment of the legacies and debts; but until the annuities are satisfied, which they never can be while any of the annuitants are living, the personal property may become insufficient, and they may have to look to the real property. But, if this is not so, then the nieces have estates for life, with remainder to their issue, who take by purchase in tail as tenants in common; and *George Barnard* has a vested estate tail in remainder in his mother's share, subject to the birth of other children of his mother; a contingent estate tail in remainder in the share of his aunts; and, if he shall be the only issue of the nieces at the death of the survivor of them, he will have an estate tail in the whole freehold, and an absolute estate in the whole leasehold. It may safely be admitted,

(*a*) 5 M. & S. 95. (*b*) 2 Bligh. P. C. 1.

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that in the construction of a will, the intention of the testator must be regarded; and that where the general intent is inconsistent with the particular one, the latter must give way to the former, if it is impossible to preserve both. The will in this case is somewhat confused, but it is clear that the testator had four several objects in view. First, to give his nieces an estate for life. Second, to give their issue an estate for life. Third, to give the issue of the surviving niece an estate tail. These are all particular intents. And, fourth, which is the general intent, to give the estate over to his next male heir, upon failure of issue of all his nieces. The first of these particular intents, namely, the giving a life estate to the nieces, will not interfere with the general intent; but the second, namely, the giving a life estate to their issue, will; because, though an estate for life may be given to an unborn child, yet no remainder can be engrafted on it. Neither will the third particular intent, namely, the giving an estate tail to the issue of the surviving niece, interfere with the general intent; and thus, if the nieces take only a life estate, only one particular intent is destroyed, and the only alteration made in the will is the enlarging the estate given to their children. If, as is argued on the other side, the nieces take an estate tail, the estate given to them is enlarged, and thus all the three particular intents are destroyed. But, the particular intent destroyed by the construction now contended for, will be destroyed according to the rules of law, because it will enlarge the life estate of the unborn issue into an estate tail, which they ought to take. *Humberston* v. *Humberston* (a). [*Bayley*, J. Suppose the nieces have several children?] Then they would take as tenants in common. [*Bayley*, J. Then it must be contended, that the words "for life, in like manner" are effectual to shew the intention of the testator, but ineffectual to perform it.] Undoubtedly. This construction will preserve the remainder to the surviving niece, and her issue, and to the next male

(a) 1 P. Wms. 332.

heir, and the whole estate will still go over in unity, because there will be cross remainders in tail between the issue. The devise to the surviving niece and her issue being "to them and their heirs, as tenants in common," clearly shews that there they are to take as purchasers. [*Bayley*, J. Suppose all the nieces dead; the survivor without issue, and one of the others leaving issue: would that clause give an estate tail to that issue? Has it ever been held that the words, if "*A.* dies without issue," can give a third person an estate tail?] The order in which the nieces may, or may not die, cannot vary the right of *George Barnard* to take an estate tail. If his mother is the survivor, he takes an estate tail by express words; and if the nieces die in any other order, he must take an estate tail by implication. [*Abbott*, C. J. Still, the question would remain, whether he would take by purchase, or by descent.] He must take an estate tail in order to give effect to the testator's general intent, because, if the issue take only an estate for life, the devisee over can never take at all. It has never yet been held, that where a life estate is given, expressly, to the first taker, and to the second, the first taker can have an estate tail. In *White* v. *Collins* (*a*), the testator devised "to *F. M.* for life, remainder to the heir male of his body for life, and in default of such heir male," over; and the Court decided that *F. M.* took only a life estate. [*Bayley*, J. The real decision in that case was, that the heir male took only a life estate.] The clause commencing "if all my said nieces, and their issue, save one, shall die without issue," contemplates the case of the issue dying without issue, and that word, therefore, is there used as a word of purchase. That clause goes on to give the whole of the personal property to the issue of the surviving niece, absolutely; which object would be totally defeated, if the nieces are to take an estate tail, because, in that case, they would have an absolute interest in the personal property. The cases cited on the other side, of *Doe* v. *Applin*, *Doe* v. *Cooper*, and *Doe* v. *Smith*, are dis-

(*a*) 1 Comyn, 289. Vide 5 East, 192. 6 T. R. 213.

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tinguishable from the present in this respect; that in all those cases it was necessary to give the first taker an estate tail, in order to give effect to the general intention of the testator. Lord *Kenyon*, in the latter case, takes the very ground now relied on, for, he says, "here are no words of limitation added to the estate given to the children (supposing they took as purchasers), and yet the remainder over is not to take effect until there was a general failure of issue." Again, this case is equally distinguishable from *Doe* v. *Jesson*. There the devise was "to *W.*, for life, and after his decease *to the heirs of his body*;" here it is to the nieces for life, and then to their *issue:* now, "issue" is very frequently used as a word of purchase, but "heir" is a word which can scarcely ever bear that construction (*a*). Here, there is an express life estate given to the issue of the nieces; but in *Doe* v. *Jesson* there was no such restriction to the heirs of the body of *W.* the first taker. Here, there are words of limitation, coupled with the devise to the issue of the nieces, which are not to be found in *Doe* v. *Jesson*, nor in any of the cases in which it has been held, that the first taker took an estate tail. In the recent case of *Doe* v. *Vaughan* (*b*), the devise was "to *J. H.* for life, and after his decease to all and every the child and children of the said *J. L.* as tenants in common, and for want of such issue, to my own right heirs for ever:" and the Court held, that *J. H.* took only an estate for life, and not an estate tail. *Ginger* v. *White* (*c*), and *Goodtitle* v. *Woodhull* (*d*), are also authorities to the same point. Upon the whole, therefore, the Court will be of opinion, that the intention of the testator was to give his nieces only a life estate in the freehold, and consequently that *George Barnard* has now a vested estate tail in remainder in one-third, and a contingent estate tail in the rest. With respect to the leaseholds, they will follow in the same proportion as the freeholds, thus far, that if the nieces took only a life estate in the freeholds, they can take no

(*a*) Fearne, 233.
(*b*) Ante, vol. i. 52.
(*c*) Willes, 341.
(*d*) Id. 592.

greater estate in the leasehold; though, even if they took an estate tail in the freeholds, they can nevertheless take only a life interest in the leaseholds.

*Parke*, for *George Irton Murthwaite*. This person will be the next heir male of the testator, of the name of *Murthwaite*, in case the nieces shall all die without issue; and although his interest under the will is certainly remote, still, if the nieces take only an estate for life, and *George Barnard* should die before full age, the remainder in fee will vest in him. The same answers therefore, are suggested to the questions in the case on behalf of this party, as have been already proposed on behalf of *George Barnard*; and the arguments advanced for the latter are appropriate also to his case. [*Abbott*, C. J. The question put to us first, is, what estate *John Cuthbertson*, the surviving trustee, *now* has under the will? Now we cannot ascertain from the statement of the case, whether the fund on which the legacies and the annuities are charged, is, in point of fact, in existence; nor are we informed whether the debts and legacies have actually been paid. It is impossible, therefore, for us to answer that question, unless we receive information on these heads. *Bayley*, J. We do not even know, whether all or any of the annuitants are still living.] That fact may perhaps be deemed unimportant to the decision of the case, because, if the testator's intention was, that the trustees should take the freehold, that will at once settle the question. [*Abbott*, C. J. He possibly might mean that they should have the estate quousque; that they should have it so long as was necessary to secure the payments for the purposes of the will.] It may be exceedingly improbable that the real property should ever be required to meet the charge of the annuities, but still the annuitants have a right to that as a security for their claims. There are also contingent remainders, if the construction urged for *George Barnard* and the present party be correct; and the trustees would continue necessary in order to pre

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serve them. The important question, however, is, what estate the nieces took, in considering which it is not necessary to dispute the cases cited on the other side, so far as they prove that the land itself will pass by a devise of the rents. Nor need it be denied that the proper rule for the construction of a will is to find, and to fulfil, the general intent of the testator; nor can any doubt be suggested as to what was the general intent of the testator in this case. The real question for the consideration of the Court is, by what construction of this will they can most fully effectuate the general intent of the testator, with the least sacrifice of the particular intents found in it, and it has been already shewn, that that object will be best attained by deciding that the nieces take only an estate for life. That was evidently the testator's intention. In the first clause he expressly gives them a life estate only, and there are no subsequent words which enlarge that gift. It is equally evident that the issue of the nieces were intended to take a life estate, and the issue of the surviving niece to take in fee as tenants in common, with a remainder over, reducing that to an estate tail. But, if the nieces take an estate tail, all these intents are frustrated: if they take for life, and their issue take in tail, one only is frustrated, namely, the life estate of the issue, which is then enlarged to an estate tail. "Issue," in the former part of the devise, means "children," and is frequently used as a word of purchase. It was said by *Clive*, J. in the case of *Roe* v. *Grew* (a), "The word *issue*, is one of the most vexed words in the books; sometimes it is nomen singulare, sometimes plural, sometimes a word of limitation, sometimes of purchase, but it must always be construed according to the intent of the will or deed wherein it is used." [*Holroyd*, J. There is another report of that case in C. J. *Wilmot*'s Opinions, 272.] Issue has never been construed as a word of limitation, when associated with terms such as are found in this will. Here, the issue are to take "for life, in like manner,"

(a) 2 Wils. 324.

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with the nieces; that is, as tenants in common. By the words "for life," the testator meant that they should take as purchasers. Those words cannot, indeed, limit the quantum of estate given; but they must, nevertheless, be regarded as explanatory of the testator's meaning; and to that meaning the court will, if they can, give effect. Then, in the case of two of the nieces dying without issue, an estate tail is given to the issue of the survivor; but as the testator intended that the issue of each niece should take some estate as purchasers, and as in the case of two dying without issue, the issue of the survivor is to take an estate tail, expressly: so, an estate tail by implication must be given to the issue of every one of the nieces, if any such there are. It is laid down by *Willes*, C. J. in *Ginger* v. *White* (*a*), as a settled rule of law, "that a precedent estate devised by express words cannot be lessened, increased, or altered, by implication, though it may by express words." In support of that position he cited the case of *Popham* v. *Bamfield* (*b*), where the devise was "to *A.* for life, and then to his first and every other son in tail male, and for want of issue male of *A.*, remainder over to another: held, that *A.* took only an estate for life." The words "for want of issue male of *A.*," in that case, are parallel to those "if all my nieces shall die without issue," in this, and therefore they cannot "increase" the "precedent" estate for life, given "by express words" to the nieces. [*Bayley*, J. Then you must reject the words "for life."] They may be rejected as being repugnant, and by doing so less violence will be done to the will than any other construction that can be contended for. In *Doe* v. *Stenlake*, the words "during life," were rejected, and yet that case precisely governs the present in principle. Here, the words may be rejected as repugnant to the devise of the issue of the issue; there they were rejected as repugnant to the devise to the heirs. To the objection, that the word "issue," is used here in two different senses, the rule of law which decides, that words shall be so construed

(*a*) Willes, 355. (*b*) 1 Salk. 236. S. C. 2 Vern. 427, and 1 P. Wms. 54.

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ut res magis valeat, quam pereat, is a sufficient answer; and that has been established in several instances. *Forth* v. *Chapman* (a), *Lord Stafford* v. *Buckley* (b), *Harris* v. *Bishop of Lincoln* (c), *Sheffield* v. *Lord Orrery* (d).

*Tindal*, in reply. There is quite sufficient upon the case to shew that there is no necessity for the surviving trustee to take the real estate for any of the purposes of the will. With respect to the main point, namely, the intention of the testator, no cases have been adduced to justify the construction suggested on the other side. Where the devise over, upon failure of issue, has reference to the first takers under the will, they cannot take less than an estate tail. If the devise over here were laid out of consideration, nothing would remain but a life estate, first to the nieces, and subsequently to their children. It has been argued, that the clause in the will contemplating the death of all the nieces and their issue, save one, without issue, confers, by implication, an estate tail upon the issue of all the nieces; but that argument is answered by the case of *Doe* v. *Applin*, which decides, that the word "issue" cannot be used in the same clause in two different senses. [*Best*, J. May not the context shew that the testator has used the same word in two different senses, and legitimately so?] Assuming that to be so, what is the result? The testator's object is, that the whole estate should go over together, upon an indefinite failure of the nieces. To effectuate that object there must be cross remainders between the issue of all the nieces; but there are no words in this will from which any cross remainders can be implied from the issue of the issue. If that construction were allowed, the estate might be divided and go over in parcels; a result contrary to the paramount wish of the testator. By the other construction, the estate would remain undivided, it would be enjoyed by the families of the nieces, throughout, before it could pass

(a) 1 P. Wms. 663.
(b) 1 Ves. sen. 171.
(c) 2 P. Wms. 135.
(d) 3 Atk. 282.

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to the ultimate remainder-man, and thus the predominant wish of the testator would be complied with, inasmuch as the nieces were the objects of his bounty.

The following certificate was afterwards sent to the Lord Chancellor :—

This case has been argued before us, and we are of opinion,

First, that *John Cuthbertson*, the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold estates, given by the will of the testator to him, *Margaret Murthwaite*, and *John Janes*.

Secondly, that the testator's three nieces took no legal estate under this will.

Thirdly, that *George Barnard* took no estate under this will.

Fourthly, that in case the will had commenced with the words "all the rents, &c.," and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that *George Barnard* would now have no estate in the freehold or leasehold tenements. But, should he survive the three nieces, and neither of them should have any other child, he will be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the life-time of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

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Where trustees, under a local act of parliament, were authorized to borrow by annuity, or at common interest, a sum *not exceeding* 30,000*l*., for the purpose of building a chapel, and for other purposes in the act mentioned, and the monies so borrowed and the interest thereof were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act; and the trustees in fact borrowed a sum of 32,636*l*., and made a rate to pay the interest of that sum:—Held, on demurrer, in an action of replevin by an inhabitant, upon whom an aliquot proportion of the rate was levied, that the trustees had exceeded their power, and that the rate was bad in toto, although the defect did not appear on the face of it.

REPLEVIN for taking certain goods and chattels of the plaintiff. Avowry by the defendant as collector of rates, imposed under a local act of parliament (51 *Geo.* 3. c. 134.), "for erecting a chapel of ease at *Islington*, in the county of *Middlesex*," by virtue of which, assessments were duly made upon the plaintiff by the trustees for the purposes therein mentioned; that defendant as collector having demanded said assessments of plaintiff, he was summoned before a magistrate for non-payment, and default being made, warrants were issued under which the distress in question was taken. The plaintiff pleaded in bar, that by the act, under and by virtue, and for the purposes of which the said assessments or rates were made, it was enacted, that it should be lawful for the trustees to erect and build a chapel, with vaults under the same for the burial of the dead, and also to inclose a sufficient quantity of ground for a cemetery or burial ground thereto; that the trustees were empowered to borrow any sums of money necessary for the purposes of the said act, not exceeding in the whole the sum of 30,000*l*., which monies so to be borrowed, and the interest thereof, were thereby charged upon and made payable from time to time out of the fees and sums of money which should be received by the collector for the time being on account of the burials in the said burial ground, and out of the rates and assessments to be made in pursuance of the said act, and for securing the re-payment of the money so to be borrowed and the interest thereof, the said trustees in manner therein mentioned were authorized to assign over the same fees and sums of money, rates, and assessments, to persons advancing and lending such money from time to time, and when they should judge necessary, to grant annuities to any person who should contribute, advance, and pay unto the said trustees any sum of money for the absolute purchase of any annuity, and payable during the life of

every contributor, so that the whole money to be raised by the granting of annuities as aforesaid, did not exceed the whole sums intended to be raised for the purposes of the said act; and every annuity was thereby charged upon and made payable out of the fees, sums of money, rates and assessments, to be made under and by virtue of the said act. Section 35. of the said act was then set out, by which it was recited that the fees or sums of money to be payable in respect of burials or interments of the dead in the said new chapel or burying ground would be insufficient to answer the purposes of the said act; and then enacted that it should be lawful for the trustees to make assessments or rates upon all the then present and future tenants and occupiers of any houses, buildings, lands, &c. within the parish, according to the yearly improved value of the premises, and as the same were ascertained and rated in the poor-rate books of the said parish for the time being, and not exceeding the sum of two shillings and sixpence in the pound of the yearly value of such houses, buildings, lands, &c.; and which rates or assessments should be paid quarterly, and the same, when received, were thereby vested in the trustees, in trust, to be applied by them for the purposes of the said act, for and during such time as any of the monies to be borrowed upon the credit of said act should remain due, or any of the annuities to be granted in pursuance or by virtue of the same, should have continuance and no longer. The plea then averred, that before the making of the said several assessments and rates, in the avowry mentioned, the said trustees had wrongfully, without any lawful authority, and in excess and abuse of the powers and authority given to them by the said act, raised, by way of annuity, and by borrowing a sum much beyond the said sum of 30,000*l.*, which sum and no more they were by the said act authorized and empowered to raise either by annuities or borrowing, to wit, the sum of 30,136*l.* by annuities, and the sum of 2500*l.* by borrowing, and exceeding by

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2636*l.* the sum they were by the said act empowered to raise as aforesaid; that the said several assessments and rates in the avowry mentioned were made for, among other purposes, the purpose of paying the said annuities and the said money so borrowed as aforesaid, and which so exceeded the sum by the said act authorized to be raised as aforesaid, and so wrongfully raised as aforesaid; and that the said rates or assessments in the said avowry mentioned were not made for the purposes and according to the said act, but were each illegal and void. Replication that at the time of making the rates or assessments in the avowry mentioned, the fees payable in respect of burials in the chapel and burying ground were insufficient to answer the purposes of the said act; and that divers annuities granted in pursuance of the said act then had continuance, and that at the time of making the rates, it was necessary, in order to raise money, to carry into effect the purposes of the act to make an assessment in the manner mentioned in the said act, and the said rates or assessments were respectively made upon the tenants and occupiers, and according to such yearly rent or value, as in the said act was required; and each of the assessments was made, and was upon the face thereof stated to be made by five or more trustees assembled in the vestry-room, and for certain times therein mentioned respectively, pursuant to the powers vested in them by the said act, without specifying any purpose for which such rates or assessments were so made; and that none of the said rates or assessments were by the title thereof, or otherwise, expressed to be made for any such purposes as in the said plea is mentioned; and that the said rates or assessments were respectively made pursuant to the powers vested in the trustees by the said act, and were in fact made for, among other purposes, the purpose of paying the annuities so lawfully granted under and by virtue of the said act, and so then continuing. Demurrer to the replication, and joinder in demurrer.

*Chitty*, in support of the demurrer, was stopped by the Court.

*Parke*, on the other side, being called upon, contended, that the replication was a sufficient answer to the plea in bar. In the plea it was averred, that the trustees under the act of parliament in question had raised a sum of money beyond that which they were empowered to raise by the act, and for purposes different from those therein mentioned. Now, admitting, that this averment was true, it was no objection to the validity of the rate in point of form. If the rate be good upon the face of it, and there is nothing to shew that it is illegal, then the defendant, as collector, is justified in making the distress. The replication only puts in issue the validity of the rate in point of form, which is all that is required of the defendant to do, and there are authorities for saying that if a rate appears to be good upon the face of it, the Court cannot go into any consideration of the purposes for which the money, when raised, is to be applied. Here the rate is primâ facie legal, and which is the only question which the Court have to determine; they are precluded from going into the question how the money may be applied. For this, the cases of *Rex* v. *Hardy* (*a*), *Rex* v. *Brograve* (*b*), and *Rex* v. *The Mayor of Gloucester* (*c*), are authorities. If the plaintiff had any ground of complaint as to the amount of the rate, his remedy in the first instance was by appeal to the Quarter Sessions, or by action, if the money had been misapplied; he cannot now take advantage of that objection, because this Court are concluded by the form of the rate, which, upon the face of it is legal. By the act of parliament, the trustees are empowered to make rates, provided they do not exceed half a crown in the pound; and the rate in point of form is not bad, whatever may be the intention of the trustees as to the application of the money when raised. It is to be observed that though the sum which the trustees are authorized to borrow is definite, yet the sum

(*a*) Cowp. 579. (*b*) 4 Burr. 2491. (*c*) 5 T. R. 346.

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which they are to raise by rates or assessments is wholly indefinite and uncertain. In addition to the clauses of the act which are set out in the plea, it may be proper to refer to other sections, which shew that the trustees have the indefinite power contended for. By s. 7, the trustees are authorized to appoint a treasurer, clerk, and collectors, and such other officers and persons as they shall think proper, and out of the monies to be received by virtue of the act, to allow and pay such salaries, wages, and allowances to those officers as they shall think reasonable. Then by s. 26, the trustees are authorized, out of the fees and rates, to pay every year to the minister or curate any sum not less than 150*l*. And by s. 30, they are authorized, out of the same funds, to pay to the clerk of the chapel for his salary, such sum as they shall think proper. So that the sums to be disbursed by them are indefinite, and therefore they have authority to raise such rates or assessments, as in their judgment may be sufficient to meet the contingent expences of each year. In this respect their power is analogous to that of overseers of the poor, who are at liberty from time to time, prospectively to raise such sums of money as they may think necessary for current expences. Here the sums which the trustees are required to pay are indefinite, and consequently the power to raise money by assessments is indefinite. On these grounds therefore, first, that the rate is legal upon the face of it, and cannot now be controverted; and, second, that the trustees have an indefinite power of assessing the occupiers of the parish, this replication is sufficient, and the defendant is entitled to judgment.

BAYLEY, J.—I am of opinion that the plaintiff is entitled to judgment on these pleadings. The question is, whether a rate made under the provisions of a private act of parliament, passed for specific purposes, can be considered as valid. The act empowers the trustees to borrow money, and to raise money by rates or assessments for certain purposes therein specified. One of those purposes is to raise

a sum sufficient to keep down the interest of money borrowed. They are entitled to borrow money by way of annuity, or otherwise; but their power of borrowing is limited, so that it does not exceed the amount of 30,000*l*. This is a special power, and therefore it must be strictly pursued, for if trustees are authorized to borrow a specific sum, and by rates, to pay the interest thereon, they have no right to borrow beyond that amount, or impose rates for the payment of interest upon a higher sum. If they levy rates to pay interest on a higher sum than they are authorized to borrow, the quantum which each occupier will be under the obligation of paying, will be varied, and the rate thereby became void in toto. It has been argued with great force, that as the trustees in this case are authorized to raise money by assessment, and that as the only purpose to which the money is applicable, is not the payment of interest, therefore this rate is a valid rate, and that the intention on the part of the trustees to misapply part of the money, does not affect the validity of the rate, as a rate, but merely authorizes the party affected either to appeal to the Quarter Sessions, or bring an action if the money is misapplied. It seems to me, however, that there is this fallacy in that argument, namely, that instead of the vice being in the ultimate misapplication of the money, it is in the original raising of the money. The trustees have a power to raise 30,000*l*. only. They would therefore have to pay the interest on that sum, and in addition to that, they would have to pay certain salaries, amongst which I include the stipend payable to the clergyman. Then they would have a right to raise as much as would be necessary for those purposes, but beyond those they could not go. If they include in the rate more than they have a right to levy, I apprehend the rate would be bad in toto. The sums to be raised are specific, or are easy of calculation beforehand, and therefore the trustees would have no difficulty in ascertaining the amount of the rate before it is made. There is a main distinction between this case and the cases cited by Mr. *Parke* in argument.

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Those are cases of poor rates, in which it is impossible for the overseers beforehand to ascertain what precise sums they shall want for the relief of the poor. As new demands are occurring from day to day, the overseers are to raise sufficient to meet whatever contingencies may happen. They cannot always foresee what demands will arise, but they are to take care to have sufficient money in hand to meet contingencies; therefore theirs is not a power to raise money to a certain limited extent, but to raise so much as in their discretion they may think will be requisite. In *Rex* v. *The Mayor and Burgesses of Gloucester*, it was objected that the parties meant at the time they raised the money, to have misapplied part of it, but the Court said that did not make the rate bad in toto. Why? Because the parties were warranted in raising to the full extent of the sum which was in that case raised. In this case, however, as it seems to me, the parties were not warranted in raising money to the extent which has been raised by this rate, inasmuch they were exceeding the powers given them by the act of parliament; and that circumstance, in my opinion, makes not only the rate, but also the warrant bad in toto. The plaintiff was only liable to contribute an aliquot part of the sum authorized to be levied by the act; he was not liable to contribute to any larger sum; he has been rated for more than by law he was liable to be rated for, a demand is made upon him for more than by law he is liable to pay, and he is distrained upon for more than he was liable to be distrained. There are cases in which it has been held, that if under a warrant of distress more is claimed, than by law the party is liable to pay the warrant is bad in toto, and cannot be considered as bad in part, and good for the residue. It appears to me that the trustees had exceeded the powers given them by the act of parliament, in endeavouring to raise a sum of money, in order to apply it for the purpose of paying this, which I am bound to call interest on money, borrowed without lawful authority. For these reasons, I am of opinion that this dis-

tress was illegal, and that the plaintiff is entitled to judgment on demurrer. 1823.

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HOLROYD, J.—I am of the same opinion. I think the rate is void, notwithstanding the way in which s. 35 of this statute is worded. This case is distinguishable from the cases cited. In *Rex* v. *The Mayor of Gloucester*, a general power was given to the persons who were employed to make the rate, to raise such sum as in their judgment they should think requisite or proper for the maintenance of the poor. The objects for which that rate was made, were all in prospectu; it was not a rate to re-pay money theretofore actually raised or borrowed. In the present case, the rate is not raised for a thing in prospectu, but to pay debts which had already been incurred with respect to monies borrowed either upon interest or by annuity, or with respect to salaries due to the clergyman and officers employed about the chapel. Those debts and demands were to be paid out of the monies raised under the authority of the act. Taking the purport of the act as it appears from its different provisions, and referring particularly to the words of s. 35, it appears to me that the trustees had power only to raise monies for the purpose of satisfying the interest upon the sum which they were originally empowered to borrow by virtue of the act, and likewise of paying the salaries mentioned in the act. Those were not matters in prospectu, as in the case of a poor-rate, where the sum wanted is wholly uncertain, and cannot be ascertained before the rate is made. Here the rate is made for the payment of money actually due, or a debt actually incurred, and not for the payment of salaries afterwards to become due, and not due at the time the rate is made. The trustees know what money they are empowered to borrow; they know that if they go beyond that sum, they are exceeding the powers granted to them, and therefore they must be aware that they are not authorized to make a rate for the payment of salaries which shall become due at a future period. If they

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raised enough to pay the interest upon 30,000*l.* and when that interest was paid, there would be an end of their power to make any rate whatever. The objection goes to affect the rate itself, which is not like the case of a poor-rate where the money is to be expended as contingencies should arise, and where if there was any misapplication of the money, a remedy is given by law.

BEST, J.—I think this case is one of the simplest that can be presented to a Court of Justice. The question is nothing more nor less than this; whether a party who has a limited authority under an act of Parliament, may come forward and avow that he has abused the powers given to him by the legislature, and at the same time demand protection. It appears by the pleadings, that the trustees had a power to raise 30,000*l.* only, and that instead of confining themselves to that sum, they raised 32,600*l.*; in order to pay the interest on which sum, they made a rate in virtue of which this distress was made. By the plea it is alleged, that the trustees have wrongfully borrowed more than by the act they were authorized in doing, and therefore that the assessment is illegal and void. What is the answer given to this plea? It is admitted that the rate was made expressly for the purpose of paying the interest on 32,600*l.* whereas the trustees had authority only to raise money sufficient to pay interest on 30,000*l.* and they are bound to admit that the rate was not made for a legal purpose; but they attempt to justify themselves by saying that the interest on the money raised could not be paid in any other mode. The power given to them by the act is limited, and if they exceed that power, their conduct is unlawful. This case stands upon a very different footing from *Rex* v. *The Mayor of Gloucester*. None of the learned Judges who decided that case, say, that the money was improperly raised. The main ground on which they decided was, that the money being properly raised, they could not go into the question of misapplication. But here it is avowed, that the money was not pro-

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perly raised, and therefore the question of misapplication could not arise. It is said this might have been the subject of an appeal to the Sessions. An appeal, however, would have been unnecessary, for if the trustees have acted without authority, all they have done is void. No appeal would be necessary to set aside an act that is void. If the act which the trustees had done, had been lawful in the first instance, but the money raised was afterwards misapplied, then undoubtedly, that might have been the subject of an appeal, for though the trustees might be justified in raising the money, yet they could not be warranted in the misapplication of it. Here it is admitted on the pleadings, that the first act was not justifiable; that it was illegal, and was an abuse of the power given by the statute. On that ground I am of opinion that the rate was void, and consequently that the distress levied upon the plaintiff was illegal.

Judgment for the plaintiff.

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Where a turnpike act imposed a scale of tolls upon *horses only*, drawing or not drawing carriages, respectively, as the case might be, and by a clause of exemption, it was provided, "that no person should be liable to pay toll more than once for passing and re-passing the gates on the same trust at any time in any one day, with the *same horses and carriages*, through the same toll-gate, but that every person having paid toll once, should afterwards pass and re-pass with the *same horses and carriages*, toll free, during the same day, through the same gate where such toll was paid;" and a stage coach drawn by four horses having passed through a gate on the trust, and paid the toll in the morning, and in the evening of the same day, the *same horses*, drawing a *different coach* of the same name, belonging to the same proprietors, driven by the same coachmen, but carrying different passengers and parcels for hire, attempted to repass the gate, and a second toll being demanded and refused, the collector seized one of the horses until it was paid:—Held, in trespass for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempted from a second toll.

THIS was an action of trespass for taking and detaining a horse belonging to the plaintiff. Plea, Not Guilty, and issue thereon. At the trial before *Burrough*, J. at the last *Summer* Assizes for *Devonshire*, the Jury found a verdict for the plaintiff, damages one shilling, subject to the opinion of the Court on the following case:—

By a local act of parliament of the 47 *Geo.* 3. intituled, "An act for repairing and improving the road from *Honiton*

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turnpike road, near *Yard Farm*, in the parish of *Lepottery*, in the county of *Devon*, to the *Ilminster* turnpike road, near the village of *Horton*, in the parish of *Ilminster*, in the county of *Somerset*," trustees were appointed, with power to erect toll-gates, &c. By s. 10 it was enacted, "that the several tolls hereinafter particularly mentioned, shall be demanded and taken at each of the said toll-gates or turnpikes which shall be erected in pursuance of this act (except as hereinafter expressly directed or provided to the contrary), before any horse, cattle, or beast upon which any toll is by this act imposed, shall be permitted to pass through the same (that is to say), for every horse, mare, gelding, or other beast drawing in any coach, chariot, barouche, chaise, curricle, landau, berlin, calash, hearse, or other carriage, the sum of 4½*d*; for every horse, mare, gelding, or other beast drawing singly or alone, any carriage of any description whatever, the sum of 4*d*.; for every horse, mare, gelding, or other beast drawing any waggon, wain, cart, or other such carriage, drawn by two horses or beasts of draught, or more, the sum of 3*d*.; for every horse, mare, gelding, mule, or ass, laden, or unladen, and not drawing, the sum of 1*d*." By s. 18, it was enacted, that "no person or persons shall be liable to pay toll more than once at any one toll gate or turnpike to be erected by virtue of this act, for passing and re-passing at any time or times in any one day (to be computed from twelve of the clock at night to twelve in the succeeding night), with the same horse or horses, cattle, beasts, and carriages through the same toll-gate or turnpike; but that all and every person and persons having paid toll once as aforesaid, and producing a ticket denoting the payment of such toll (which ticket the collectors of the tolls are hereby required to give, gratis on receipt of the toll) shall afterwards pass and repass with the same horse or horses, cattle, beasts, and carriages, toll-free, during the same day, through the same toll gate or turnpike where such toll was paid: Provided always, that not more than one toll shall be taken from any

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person or persons for passing or repassing the same day with the same horse or horses, cattle, beasts, and carriages, through all the toll gates or turnpikes to be erected by virtue of this act; but that every person having once paid the toll by this act imposed, and producing a ticket denoting the payment hereof (which ticket the collectors of the tolls are hereby required to give gratis on the receipt of such tolls), shall pass and repass with the same horse or horses, cattle, beasts, and carriages, toll free, during such day, through all the other toll gates or turnpikes to be erected in and upon these roads." And by s. 13. it is enacted, that "if any person shall refuse to pay the toll after demand thereof made, it shall be lawful for the toll collector to seize and distrain any horse, cattle, or beast, upon which any toll is imposed by this act." Under this act toll gates have been erected, and among others one called the *Devon* gate, at which the defendant on the 11th *April*, 1823, was the toll collector. On that day the *Bath* and *Exeter* subscription coach, driven by one *William Wager*, (as servant of the proprietors) drawn by four horses, and carrying passengers and parcels for hire, passed through the *Devon* gate in its way from *Exeter* to *Bath*. The toll of 1*s.* 6*d.* being 4½*d.* for each horse, was paid by the driver on passing through the said gate, and a ticket denoting the payment of the tolls was given by the defendant to *Wager* the driver. In the evening of the same day, a different coach called by the same name, and belonging to the same proprietors, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels also for hire, passed through the same gate on its way from *Bath* to *Exeter*; the driver, *Wager*, produced the ticket which had been given to him in the morning, but the defendant insisted on taking a second toll of 1*s.* 6*d.*; and upon the driver's refusing to pay this second toll, the defendant took one of the horses from the coach, and retained it, until the sum of 1*s.* 6*d.* was paid to him by the driver. The gate called the *Devon* gate is within the county of *Devon*, and

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the horse so taken was the property of the plaintiff *Loaring*, one of the proprietors of the coaches. The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If the Court shall be of opinion that he is entitled, the verdict to stand; if not, a verdict to be entered for the defendant.

*Fraser*, for the plaintiff. The question is, whether the horses in this case, being the same as those which went through the gate in the morning, but the coach being different, and carrying different passengers and parcels, any more than one toll is demandable under this act of parliament. It is submitted upon the reasonable construction of the act, that although the coach may be different, yet the same horses were entitled, on their return journey, to pass through without paying a second toll. By the 10th section it is clear that the toll is imposed upon horses only, and not upon the carriage, because upon adverting to the scale of tolls therein mentioned, the tolls which are payable are uniformly referrable to the horse or other beast, whether drawing or not drawing, and not to the carriage drawn. It is obvious that the legislature thought it sufficient for the purposes of this trust, that the toll should be payable but once upon the same thing, when passing to and fro during the same day, and the Court will give effect to that intention, unless the words in the exempting clause tie them down to a different construction. The words of that clause must be commensurate with those of the clause which imposes the toll. By the latter, the toll is imposed upon the horses only, whether drawing or not drawing. The words of exemption in the 18th section are, "that no person shall be liable to pay toll more than once for passing and repassing in any one day with *the same* horse or horses, cattle, beasts, *and carriages*, through the same gate." Now it may be said, that the word "same" over-rides the whole of the exemption, and that the Court are bound to read the exemption as applicable only where the *same horses* AND *carriages* have already

paid the toll once. Taking the word "same" to be so read, still, according to the letter of the act, it will not be sufficient to compel the party to pay the second or returning toll, because the toll is originally payable upon horses drawing or not drawing, and therefore the exemption cannot be confined in its operation to horses not drawing, so as to subject the same horses to a second toll when they are not drawing the same carriage. In *Gray* v. *Shilling* (a) it was held, that a toll having been paid on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage; and *Dallas*, C. J. observed, that even if the case of *Williams* v. *Sangar* (b) had not been decided, he should have thought, from the construction of the statutes then under consideration, that horses having drawn a carriage through the gate in question, for which toll had been paid, would not be liable to pay a second time on the same day, although they repassed through the gate with a different carriage. The specific mention of "carriages," in the 18th section, may have been for the purpose of shewing that horses drawing, or not drawing, were equally exempt from the payment of a second toll. At all events the intention of the legislature is so doubtful, that on that ground the plaintiff could not be called upon to pay two tolls, it having been frequently decided, that in order to charge the public with a burthen, it must appear in unequivocal language that the burthen was intended to be imposed. In *The Leeds and Liverpool Canal Company* v. *Hustler* (c), it is laid down by *Bayley*, J., that where the effect of a clause in an act of parliament is to cast a burthen upon the public, it is to be construed liberally on the side of the public, and that to make the public liable, the language must be express and unequivocal. Here the language of the act is at least

(a) 1 J. B. Moore, 371. S. C. 2 B. & B. 30.

(b) 10 East, 66.

(c) Ante, vol. ii. 564. See also *Earl Shaftesbury* v. *Russell*, ante, 84.

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ambiguous, and therefore the verdict for the plaintiff ought to stand.

*Adam*, contrà, was stopped by the Court.

BAYLEY, J.—I think judgment ought to be given in this case in favour of the defendant. Cases of this nature must all depend upon the manner in which the different acts of parliament on which they arise are respectively worded. We are to be governed by the words of this act of parliament. The object of imposing tolls on a turnpike road, is to indemnify the trustees for the expence of keeping the roads in repair. It is true that a duty is imposed in this case primarily upon the horses, in respect of the injury which they may do to the road in passing to and fro; but the degree of injury which they do, must depend upon the manner in which they are respectively employed, and therefore the legislature in imposing the toll, had reference to that circumstance. A riding horse cannot be supposed to do as much injury to the road as a horse employed in drawing a carriage, and consequently the toll is regulated according to the manner in which the animal is used. By the 10th section a toll of 4½*d.* is imposed, first, on every horse, mare, gelding, or other beast, drawing in any coach, chariot, barouche, &c.; second, a toll of 4*d.* on every horse, &c. drawing singly or alone, any carriage of any description whatsoever; third, a toll of 3*d.* for every horse, &c. drawing any waggon, wain, cart or other such carriage, drawn by two horses or beasts of draught or more; and, fourth, a toll of 1*d.* on every horse, &c. laden or unladen, and not drawing. Now, it is true, that in this section there is no toll imposed from first to last upon the carriage; it is imposed on the horses only. But then comes the exempting clause, by which it is enacted, "that every person having paid toll once, and producing a ticket, denoting the payment of such toll, shall afterwards pass and repass with the same horse or horses, cattle, beasts, and *carriages* toll free, during the same day, through the

same toll gate where such toll was paid. Why is the word "carriage" here introduced? I can see no reason except for the purpose of confining the exemption to those horses which are employed in drawing the *same carriage*, with which they had set out. If the owner claims an exemption for drawing horses returning, they must be employed in the same carriage, and therefore, where the same horses are employed in the same carriage going and returning, then they will be exempt from toll in carrying back. As no toll is imposed on carriages in the 10th section, I can discover no reason for mentioning them in the 18th section, but that to which I have alluded. Many obvious instances might be put to shew the propriety of this construction. For example, if a post-chaise is hired to go a stage, and the horses are brought back with the same carriage, no second toll would be due, but if the horses bring back another carriage with another set of travellers, I take it to be clear that there would be no exemption from the payment of a fresh toll. The circumstance of the horses being the same, makes no difference, unless the carriage is the same, and therefore the word "carriage" could only have been introduced into the exempting clause, for the purpose of shewing that there was no exemption, unless the same horses and the same carriage came back together. The cases cited by Mr. *Fraser*, (who argued the case with great ingenuity) are distinguishable from this, because the words of the acts of parliament upon which they turned are different from the words here.

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HOLROYD and BEST, Js. concurred.

Postea to the defendant.

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## CATHERINE MARTHA MELLISH *v.* WILLIAM MELLISH, EDWARD MELLISH, and THOMAS MELLISH.

Testator devised his estate called *H.* to his daughter, in these terms: "*H.* to go to my daughter *C. M.* as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother *W. M.*"—Held, that *C. M.* took an estate in tail male, with a reversion in fee, subject to the other estates created by the will.

THE following case was sent by the Lord Chancellor, for the opinion of the Judges of this Court:—

*John Mellish*, the testator named in the pleadings of this cause, being seised to him and his heirs in fee-simple of a capital messuage and other hereditaments situate in the county of *Hertford*, and known by the general name of *Hamels*, subject to a mortgage for a term of years, made his will, which was duly executed by him, and of which the following is an exact copy and imitation, both in words and figures (that is to say),

| | | | |
|---|---|---|---|
| " Mar$^{ge}$. Settlement | £12,500 | *C. P.* | £120,000 |
| Do. | 25,000 | *J. M.* | ——— |
| | ——— | | 120,000 |
| | 37,500 | | 80,000 |
| *Hamels* - | 43,000 | | ——— |
| | ——— | | £40,000 |
| | 80,500 | | |

*Catherine Mellish* to have the disposal of the 25/*m*; in case *she* does not dispose of it, I wish it to go to as foll$^{s}$:—

5/16 *W. M.*
5/16 *E. M.*
3/16 *T. M.*
3/16 *A. G.*

The mortgage on *Hamels* to be p$^{d}$ off as soon as *William Mellish* can do it, without prejudice to the business.

*Hamels* to go to my daughter *Catherine Mellish*, as follows; in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother *William Mellish*.

I give as follows—

| | | | |
|---|---|---|---|
| * C. M. | £5000 | *(£3000 | * £500 J. L. Bonhote. |
| W. M. | 10,000 | | 200 Dessoulary. |
| E. M. | 7000 | | 200 Mouchet. |
| A. G. | 5000 | | 40 £40 Bentley; |
| T. M. | 5000 | | Miss S. Salmon £200. |
| | 30,000 | | 50 J. Bonhote. |
| | | | 20 Macdonald. |
| | | | 1010 |

* These initials mean my daughter, my three brothers, and my sister.

* I desire that one thousand pounds of the three thousand pounds left her, may be paid to my daughter, immediately on my decease.

Mrs. *Pinfold* to receive £200 a y[r] from *Catherine Mellish*, during the life of Mrs. *Pinfold*; a year's wages to all my household servants, and likewise to *Webster*; and I desire mourning may be given to all my servants, the same as at my dear wife *C. M.*'s death.

I leave my dear brothers *W. M.*, *E. M.*, and *T. M.* my sole executors and guardians of my child *Catherine Mellish*, being convinced they will take the same trouble on them, and I leave my brother *William Mellish* my sole legatee.

This is the last will and testament of *John Mellish*.

*John Mellish* of the parish of *St. George, Hanover Square*, and of *Hamels*, in the county of *Hertford*, Esquire. In witness whereof I have set my hand to the other side, and my hand and seal to the present, at the *Magpye Inn*, on *Hounslow Heath*, this fourth day of *April*, in the year of our lord one thousand seven hundred and ninety-eight.

I give to Mr. *W. C. Chambers*, one thousand pounds.

*John Mellish* (L. S.)

Sealed and delivered in
the presence of

*J. R.*
*P. P.*
*W. B.*"

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The testator departed this life on or about the 9th of *April*, 1798, without having revoked or altered his said will, leaving the said *Catherine Martha Mellish*, in the said will called *Catherine Mellish*, the plaintiff, his only child and heir at law. The question directed for the opinion of this Court was, what estate and interest the said *Catherine Mellish*, the plaintiff, takes in the estate called *Hamels*?

*Preston*, for the plaintiff. According to the principles by which this will is to be construed, and the authorities bearing upon it, the plaintiff, Miss *Mellish*, takes an estate in tail male in *Hamels*, with a reversion in fee, subject to the other estates created by the will. This construction, it must be obvious, will effectually answer the general intention of the testator; and the Court must observe, that any other construction might place this property in a line of enjoyment contrary to his intention. It is impossible not to see that his only daughter is the first object of his bounty, and in contemplating her marriage, he contemplates the birth of a son; but in doing so, he does not use the word "son," as meaning any particular individual, but uses it as a nomen collectivum, importing all the male line. Any other construction would produce the greatest absurdity. If Miss *Mellish* takes only an estate for life, and she has but one son and several daughters, and during her life, her son dies, leaving a son, the latter would be excluded by a daughter; and if the inheritance be suspended till her death, and could only vest at that time, it would follow that if she had left a grandson and no son, the grandson could not take, but the property would go to the eldest daughter, if more than one; and in case she had more than one daughter at her husband's or her own death, and no son, the estate would go to the eldest daughter, in exclusion of a grandson; and in case she had but one daughter and no son at that period, the estate would go to *William Mellish* the uncle. Now the Court cannot impute such an intention to the testator, unless they are compelled so to do by the very terms of the will. It is

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now acknowledged to be a general rule established by a variety of cases, that if a man gives to another an estate for life, with remainder to his son or sons, unless it can be shewn, that the son is to take eo nomine as purchaser, the rule of law in favor of the intention of the devisor, requires that the word "son" or "sons" shall be construed as a nomen collectivum, and descriptive of the whole class of male descendants, and thereby give to the devisee an estate of inheritance in tail male. The real difficulty in this case is, to determine precisely what estate the testator's daughter takes. It cannot be contended that she takes an estate in fee. Her daughter might take as purchaser, from the peculiarity of the language of the will, because the general intention will not allow the parent to take an estate in tail female. From the scope of the gift, however, sons and more remote descendants, being males descended from males, might take through the medium of being heirs and descendants of *Catherine Mellish*, the parent. But what difficulty is there in saying that the daughter of *Catherine Mellish* may take as purchaser, although the sons take by descent through the medium of their parent? The case of *Wight* v. *Leigh* (a) shews, that there would be no difficulty in maintaining that proposition. In that case there was a devise "to *A.*, and after his death to his first and other sons; and in default of issue male, then unto his eldest and other daughters, and to their heirs male for ever," and it was held, that *A.* took an estate in tail male. [*Bayley*, J. In that case, the daughters must have taken as purchasers, and therefore that case is not an authority for you, as it shews that although the word "son" might give the devisee an estate in tail male, yet the word "daughter" might be used as a word of purchase.] In *Wharton* v. *Gresham* (b), the testator devised all his estates, as well real as personal, to his nephew *Anthony Wharton*, and to his sons in tail male; and for want of such issue male, to his brother Captain *John Wharton*, and to his sons in tail male, and in failure of such

(a) 15 Ves. 564. (b) 2 Sir W. Bl. 1083.

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issue male, then to his own right heirs; and it was held, *John Wharton* took an estate in tail male. There the Court construed the word "sons" as a collective term, giving the inheritance to the first devisee. [*Best*, J. In that case the estate was given "to the sons," which would mean *all* the sons; here but one son only is mentioned.] In *Charlton* v. *Craven* (*a*), the devise was "to *Thomas Charlton* during his natural life, with remainder to the first son of the body of the said *Thomas* in tail male, lawfully begotten, severally and successively;" without saying "to the second, third, fourth, and other sons in tail male," but to "the first son *in tail male*;" so that these latter words were not at all applicable;" and for want of such lawful issue, either of his son *Thomas Charlton*, and his son *James Charlton*, then the testator devised the estate to his daughters and their children, share and share alike; to be held to them and their heirs for ever, as tenants in common, and not as joint-tenants." Upon the construction of this devise, the Lord Chancellor held that *Thomas Charlton* was tenant in tail, and this Court was of the same opinion upon a case sent by his Lordship; and in the Court of Exchequer last year, that Court came to the same result, acting upon the authority of *Robinson* v. *Robinson* (*b*). [*Bayley*, J. In *Charlton* v. *Craven*, though there are not the words "to the second, third, fourth, and other sons in tail male," yet the words "severally and successively" would sufficiently point out the real mode in which the male line would take.] Exactly so. There is, therefore, the decision of three Courts, that in that case, *Thomas Charlton* took an estate in tail male, and in his own right, and the decree in all these decisions was against a purchaser. Now there is another class of cases which

(*a*) Stated by the learned counsel to have been decided in Chancery, 12th *December*, 1811, and since then to have been before this Court, and before the Court of Exchequer, in *Trinity*, 1823; but the case is not yet reported.

(*b*) 1 Burr. 38.

shew that the word "son," may comprehend all the descendants. The first is *Sonday*'s case (*a*). There, *Merick Sonday*, being seised in fee of a house in *Lambeth*, devised the same to his wife for life, "and after her decease, his son *William* to have it, and, if his son *William* married, and have by his wife any male issue lawfully begotten of his body," (which approaches very much to this case, in looking towards such a contingency) "then his son to have it; if he have no male issue lawfully begotten of his body, then his son *Samuel* to have the house; if *Samuel* marries, and have issue male of his body lawfully begotten, then his son to have the house after his decease; if no issue male, then his son *Thomas* to have the house; if *Thomas* marry, having a male issue of his body lawfully begotten, then his son to have the house after his decease; if he leave no issue male, then his son *Richard* in like manner," et totidem verbis, and so to *Daniel*, totidem verbis; and then he adds this clause, "his will and mind was, that if any of his sons, or their heirs males, issue of their bodies, go about at any time to alienate or mortgage the house, that then the next heir to enter upon the house and enjoy it." After argument, it was resolved, that the son, *Thomas Sonday*, and the other sons had an estate tail to them severally, and to the heirs males of their bodies; and that for three reasons; first, because the testator saith, "if he hath no issue male, his son *Richard* to have it," which is as much as to say, "if *Thomas* dies without issue male," which words are sufficient to create an estate tail in him. Second, the last clause "if any of his sons, or their heirs males issue of their bodies go about," &c. which explains the first words, that the male issue shall be heir, and take by descent; the first words being "that his son shall have the house after his decease," *i. e.* shall have it as heir; for the words of the will make it manifest, "and if any of their sons, or their heirs males issue of their bodies," &c. also, after it is said "that then the next heir to enter." Third, the thing prohibited proves it

(*a*) 9 Rep. 127.

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also; for as well his sons as their heirs males are prohibited to alien or mortgage, &c. and every restraint (*a*) implies (and especially in a will), that the parties (if the restraint had not been made) had power to do that which is prohibited, which is the reason that he restrains them; and if his sons should have but an estate for life (*b*), this clause of restraint, that if they should alien, &c. then the next heir should enter, &c. would be idle and of none effect. Thus, the word "sons," as to whom the estate was only stated as being a gift, was construed in that will collectively, as including all the male issue of *William*, the first taker. The next case in support of this proposition, is *Wyld* v. *Lewis* (*c*), which, however, is rather the case of an estate tail by implication, but it shews the construction to be put upon the word "sons." There, *Richard Wyld*, devised to his wife *Elizabeth*, all his lands, &c. not settled in jointure, generally, and then followed these words, "if it shall happen that my said wife *Elizabeth*, shall have no son nor daughter by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, and if he shall be then living, and his heirs for ever, only paying to his brother (*A. B.*) the sum of 150*l.* within one year after the decease of the said *Elizabeth*." In that case the words "son" and "daughter," are in the singular number, but from the use of those words, the Court held, that the wife became tenant in tail, and the reason given by Lord *Hardwicke* for that opinion was, that "the testator intended to make an absolute disposition of his whole estate, and not suffer any part to descend as undisposed of in case of any contingency; and as he intended a disposition of the whole by his will, the objection that the grand children by this construction are liable to be excluded, is a very strong argument for construing this an estate tail, and the inclination of the Court to avoid this absurdity, has been the principal reason for construing the words in the singular number, and which are

(*a*) Bridgm. 137. (*b*) Cro. Car. 185. (*c*) 1 Atk. 432.

properly descriptive of particular persons only, in a collective sense, as including the descendants of the first takers." This is the reason given in all cases of this description. The next case is *Robinson* v. *Robinson* (*a*), and there the devise was expressly to *A. B.* for life, and no longer, and after his decease "to such *son* as he should have lawfully to be begotten taking the name of *Robinson*, and in default of such issue, then to the testator's cousin and heirs for ever;" and it was held, in the King's Bench and in the House of Lords, upon the apparent intention of the testator to confer the estate upon the family of the first devisee, that his male descendants should take through him as tenant in tail. The House of Lords decided that the word "son," lawfully to be begotten, was a collective term, and included all the descendants in the male line from the original devisee. These are the material authorities upon which reliance may be placed in support of the proposition contended for. It may therefore be taken as a clear proposition of law, that though there are words in a devise by which a party may take an estate tail in remainder by implication, yet, the word "son" is to be construed as a word of limitation, and descriptive of a class of individuals, and including all the male descendants of the person to whom the gift is originally made. [*Bayley*, J. In *Jones* v. *Morgan* (*b*), I believe Lord *Thurlow* says, that he had looked through forty or fifty cases, and states as a distinction, that if the word "son," be nomen collectivum, as taking in the whole class, it is a word of limitation, and not a word of purchase, but that if the estate be given to one individual only, it is to be construed as a word of purchase, and not taking in the whole class.] Here, the word "son" is obviously a word of limitation, and brings this case within the rule laid down in *Sonday*'s and the other cases referred to. Upon these authorities, it is submitted, that Miss *Mellish* takes an estate in tail male, for otherwise the gift would be so narrowed as to produce such inconveniences, as the Court would be most anxious to avoid, if it

(*a*) 1 Burr. 38. (*b*) 1 Bro. C. C. 219.

can be done consistently with the language of the will, and the authorities cited. If she were to take simply as tenant for life, her husband would be excluded from all benefit, and if she should die leaving only a grandson, that grandson would be excluded by a daughter. Suppose there were twenty male descendants as grandsons, none of them would take, and then this absurdity would follow; that the grandsons would be excluded by a daughter, so that a daughter would take in exclusion of a male descended from a male, and *William Mellish*, the uncle, might take, though there was a grandson at the death of Miss *Mellish*, because no "son," was living when that event took place. Now this would be contrary to the obvious intention of the testator, which clearly was, that if there should be a male descendant of his daughter, he and his male descendants should take in exclusion of a daughter, and that *William Mellish* should not take to the exclusion of a son, grandson, or any more remote male descendant of his niece, or to the exclusion of the eldest of two or more daughters, if there should be more than one, and the male descendants should fail. On these grounds the plaintiff is entitled to a certificate in her favor as tenant in tail.

*Tindal*, contrà. It is not necessary to the true construction of this will, for the Court to decide, that Miss *Mellish* takes either an estate for life, or an estate tail. Looking to the frame of the will, the construction which the Court must put upon it is, either that a fee descended, or was devised to her by the will, defeasible in three events. The first is, her marriage, and the birth of a son, when it was to go to him; the second, her having more than one daughter, and no son, in which event the eldest daughter was to take; and third, her having no child at all, in which case the estate was to go to *William Mellish*, the testator's brother. These are executory devises, which are to take effect within the rules applicable to such devises, so that *William Mellish* might be entitled to the estate in fee. It is not meant to be

contended that at the present moment the fee is not vested by descent in *Catherine Mellish*; for if the Court find that she took an estate for life with contingent remainders, or an estate in fee, defeasible upon any of the events just mentioned, and that the subsequent estates are executory devises, then in either of those cases, the fee will in the mean time descend upon her until some one of the contingencies happen, according to the rules of construction applicable to this sort of cases (*a*). But the question is, whether, upon looking at the terms of the will, the testator has given her a particular estate, different from the fee which has descended to her, with contingent remainders, or whether the limitations to the son, eldest daughter, if there are more than one, and *William Mellish*, are executory devises in defeasance of the fee-simple, which has come to her either, by descent or by the devise. Looking to the general intent of the testator as collected from the language of his will, the latter seems the most consistent interpretation. Wherever he mentions the estate, he is manifestly dealing with the whole fee, with an intention of transmitting the whole, without any limitation. The words he uses are "*Hamels to go* to my daughter *Catherine Mellish*;" and then again he says, "in case she marries and has a son, *to go* to that son," and then in the third contingency, the same language is used, evidently shewing that he means to devise the whole, and not a part of the estate. By the use therefore of the words "*Hamels* to go to my daughter," he evidently meant to pass the whole of his estate, and not to divide the fee-simple into particular estates and remainders. The words "to go," used in these several instances, imply that the whole is to go in that line of transmission which is pointed out. If any doubt could be entertained of this, the circumstance of the testator having immediately afterwards directed the payment by his daughter of an annuity of 200*l.* a-year to Mrs. *Pinfold*, shews that such must have been his intention. Now, there is a class of cases, which shew that where an annuity is

(*a*) See Fearne on Contingent Remainders, 351.

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charged upon a person taking an estate, the law considers it a devise of the fee, in order to prevent the devisee from being damnified, which might be the case if the party took for life only. For this *Andrew* v. *Southouse* (a), *Lee* v. *Withers* (b), *Com. Dig.* tit. *Devise*, (N. 4.), are authorities. The circumstance also of his directing his brother to pay off the mortgage on *Hamels* "as soon as he can do it, without prejudice to the business," is also in furtherance of this construction. Had he merely given the estate of *Hamels* by name, that would have carried the fee, as much as if he had said, "all my interest in *Hamels*." If, therefore, it can be shewn, that by the word "*Hamels*," he meant his whole interest in that estate, then the whole interest would have passed as much as though he had used those very terms. The testator thought that he was dealing with the fee-simple when he says "*Hamels* to go to my daughter, as follows," and meant to give her the inheritance. Undoubtedly, where it is left as matter of doubt, whether the devise shall operate as a contingent remainder, or an executory devise, the rule upon which the Court acts, is to construe it in favor of the former, and not of the latter. But in this case the Court are not left to chuse between those two, but they are to determine whether they will imply particular estates for the purpose of supporting these contingent remainders; the effect of which would enable Miss *Mellish* to defeat the testator's general intention. No case can be found which will sanction such a decision. The reasonable construction of the will is, either that the estate descended to Miss *Mellish*, or it was devised to her by the will, defeasible on the happening of any of the three events mentioned in the will. The first of those events "is in case she marry and have a son." This does not import that the estate is given to her for life only, which would have been done in terms if that had been the testator's intention. This is obvious upon comparing the devise to the son and to the eldest daughter respectively. The daughter is only

(a) 5 T. R. 292. (b) Sir T. Jones, 107.

to take at the death of her mother or her father, whereas the son is to take immediately, it not being necessary that he should be living at the time of her death. It is apparent from the will, that the testator did not mean to prefer the female line, because from the pecuniary provision made for a daughter he thought he had given enough to maintain a female; for he says, "in case she has but one daughter, or no child, at the time of her death, I desire it may go to my brother *William Mellish*." No argument can be derived from the supposed unreasonableness of the testator's preferring his brother to his own immediate issue, because it would not be more unreasonable for him to prefer his brother to his grand-daughter, than to prefer a grandson to a grand-daughter. The testator was evidently looking forward to the founding of his family; and was therefore desirous of having a male relation to succeed him. This is a satisfactory solution of the circumstance why he puts by his daughter and grand-daughter, in favor of a son; and it is further explained by the fact of his having made a pecuniary provision of 25,000*l.* for one daughter, in case there should be but one. This shews that throughout, he is contemplating a male successor to the estate. If not, why is such ample pecuniary provision made in the out set for Miss *Mellish*? Suppose Miss *Mellish* should marry early, and then live to the age of eighty, and she has a grandson, why should the grandson wait till he attained the age of fifty or sixty, before he could take, and not take immediately, whilst his mother has such ample provision? [*Bayley*, J. Suppose she had a son, and that son died without issue, and then she had another son, what would be the result?] If she had a son, and that son took a vested interest in the fee, and then died, leaving no children, the brother of that son would be his heir. [*Bayley*, J. But suppose the first son lived only two days, and then she had a second son, he would not take his title from the first, but would, I apprehend, take as purchaser.] That is a possible contingency;

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but it is not one likely to have occurred to the testator, and can only be considered as a very nice supposition. [*Bayley*, J. It is not a very extravagant one.] It is evident that the testator was desirous of having a male relation to succeed him, by the manner in which he provided for his daughter and grand-daughter, if there should be but one; for he says, " if there be only one grand-daughter, the estate is to go over to his brother. [*Bayley*, J. Your argument would go to this, that if Miss *Mellish* had ten daughters, and each had children, and the mothers of those children died before Miss *Mellish*, their children would take nothing.] If she has more than one daughter at her husband's or her own death, then it is to go to the eldest daughter; but if she has none, it is to go to the testator's brother. The intention of the testator is to be regarded, and in order to effectuate that, the Court will look to the manner in which he has framed his will. The most reasonable construction is that now contended for. In case there shall be more than one daughter, the others will take the personal property; but it is obvious, from the scope of the will, that the real estate was not to be divided or frittered away, but to go to a son; if no son, to the eldest daughter; and if there is no person to answer that description, then to his brother. [*Bayley*, J. Then suppose the eldest of three daughters of *Catherine Mellish* dies in the life-time of her mother, leaving children; and the second daughter dies in the life-time of the husband, leaving children; and that at the death of *Catherine Mellish* there are two daughters living, who would take the estate?] The words of the will are, " in case she has more than one daughter at her husband's or her death, and no son, *Hamels* is to go to the eldest daughter. [*Holroyd*, J. Unless you can make out that the fee was intended to be given to *Catherine Mellish*, I conceive that the testator meant the estate to go by descent, because he gives her the whole estate, as appears by the calculation in figures of the value of *Hamels*.] The fee either goes to her by descent, or she

takes it by purchase, and it is immaterial for the purpose of the present argument, through which medium she takes it. The cases cited on the other side, with a view of shewing that this is an estate tail, are clearly distinguishable from this. In *White* v. *Leigh*, the words were " in default of such issue," which are not to be found here. So in *Wharton* v. *Gresham* there were the words " for want of such issue ;" and in *Charlton* v. *Craven* there were the words " severally and successively," which render that case wholly inapplicable to this. The case cited to shew that the word " son" in the singular number, is a word of limitation, does not bear out the proposition contended for. In *Sonday*'s case there was a designation of the person who was to take. But in *Lovelace* v. *Lovelace* (a) it was held, that a devise to *I. D.* and to his *eldest* issue male, he having no son at that time, gave an estate for life only, and not an estate tail; but that a devise to one of his issue male, is an estate tail. [*Bayley*, J. It is said in *Robinson*, on Gavelkind, p. 37, that the lands in that case were gavelkind. Then if they were, it was the same thing as saying, "*A.* shall take *for life only*, and then the eldest son."] It is enough for the defendant to shew that the cases cited on the other side do not support the construction for which they are cited. The general intention of the testator will be better satisfied by a contrary construction; and therefore whether Miss *Mellish* take by descent or by the devise, *William Mellish* will be beneficially interested.

*Preston* in reply. Since this will has been the subject of consideration, it has never occurred to any professional body, to imagine that the fee passed by executory devise. The doctrine that the heir at law cannot be disinherited without express words for that purpose, was never more applicable than in the present case, and shews the infirmity of the argument on the other side. Nothing can arise from the circumstance of the mortgage being to be paid off, because *William Mel-*

(a) Cro. Eliz. 40.

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*lish*, as residuary legatee and executor, is directed to pay it off, and he is not to do so until there are funds sufficient for that purpose, "without prejudice to the business." Then as to the annuity to Mrs. *Pinfold*, it is a mistake to suppose that that is a charge on the real estate. It is true that she is to receive it from Miss *Mellish*, but it is only a charge on the personal property. When an annuity is given by a testator, it is merely a gift of personal property, unless there are words to shew that it is intended to be charged on the realty. In one part of the argument on the other side, it is said that Miss *Mellish* takes an estate for life. If so, then this dilemma will arise, that every gift after, must be a contingent remainder, and consequently in danger of being destroyed by an act which would unite her freehold with the fee descended to her. It is said, that these are executory devises; but it is a clear rule of law, that no gift is an executory devise, if by any construction it can operate in any other mode. The law of executory devises was introduced in favor of the intention of testators, whose gifts could not operate in any other mode. If it be true, as has been argued, that the gift to Miss *Mellish* is defeasible in three events, what is to become of the husband? Should the fee be determined by an executory devise, the courtesy will fail with it. This, however, is inconsistent with the will, because the testator evidently intended that the husband should have the enjoyment of the estate, in the event of there not being any son; for though it is to go to a son immediately, yet in case there is no son, but daughters, it is to go to the eldest daughter, either *on the death of her father or mother*. Then, it is said, that immediately upon the death of Miss *Mellish*, if she have a son, he is to take, but not if she have one or more daughters. Now this is a construction utterly inconsistent with the will, because a daughter can only take in the event of there not being any son. [*Bayley*, J. What estate do you say the eldest daughter will take if there are more than one?] Not more than a life estate, for want of words of inheritance. [*Bayley*, J. Then it descends to all the daughters equally?] That will depend

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upon circumstances. Suppose *Catherine Mellish* to have one son by her first husband, the defendant's argument assumes, that such son would take immediately upon his birth as purchaser; so that if he die without issue, leaving a sister of the whole blood, and a brother of the half blood, the latter would be excluded. That would be one incongruity in the construction on the other side. Again, suppose *Catherine Mellish* were to die leaving grandsons, they would not take unless she herself took an estate tail. Was that the intention of the testator? Did he intend to prefer his brother if there were any male descendants of his daughter? It is absurd to suppose that her male descendants are to be excluded merely because there might happen to be no son at the time of her death. This is incompatible with the intention of the testator in other respects. Suppose all the daughters died leaving issue during Miss *Mellish's* life-time, can it be contended that the issue are not to take, and that the estate is to go over to *W. Mellish*? The testator's intention obviously was to prefer the male line of his daughter, and to prefer all her descendants, both male and female, to *William Mellish*. Had he framed a different intention, he never would have introduced words shewing that the eldest female was to take as an heiress, in preference to his brother. This, therefore, shews that Miss *Mellish* is tenant in tail male, and that the testator intended to extend the gift to all her heirs. In addition to the cases already cited, *Dubber* v. *Trollope* (*a*) is an authority for shewing that the words "heir male" are to be taken in a collective sense, and importing an estate tail. [*Bayley*, J. You could not argue that the word "daughter" would include grand-daughters.] No: that point was argued and decided before the Vice Chancellor in another case, a short time since. [*Bayley*, J. Your argument is, that supposing Miss *Mellish* had a son, who died without issue, and that she had several daughters, all of whom had issue, and she survived her daughters, their issue would take upon the death of their

(*a*) 8 Vin. Abr. 213. Ambl. 459.

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grand-mother, in preference to *William Mellish*.] Undoubtedly. [*Bayley*, J. Suppose Miss *Mellish* takes an estate in tail male, with remainder in fee, and at the time of her death there be no sons or daughters living, would the estate go to *William Mellish* in fee, or how would it go?] There are no words of limitation to *William Mellish*, and therefore he would only take a life estate. Any other construction than that now contended for on behalf of Miss *Mellish*, would introduce absurdities, which the Court would endeavour to avoid as much as possible.

BAYLEY, J.—There is one case which has not been mentioned, in which the word "son" has been construed as nomen collectivum, namely, *Byfield's* case (*a*), and the decision there was, in principle, the same as in *Jones* v. *Morgan* and *Robinson* v. *Robinson*. From these authorities it is to be collected, that if the word "son" is used, not as designatio personæ, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator, to give an estate tail; and it is quite clear, that words are not to operate by way of executory devise, which are capable of operating in any other way. Now in this case, the words are, "*Hamels* to go to my daughter *Catherine Mellish*, as follows; namely, in case she marries and has a son, then it is to go to that son." If the word "son" be used here as nomen collectivum, then it will give to *Catherine Mellish* an estate to continue so long as there shall be any male descendants of *Catherine Mellish*. What estate would that be? An estate in tail male. In no subsequent part of this will do I see any thing which varies the construction which ought to be put upon it, if it had stopped here; but we shall not give our decision at present.

HOLROYD, J.—It occurs to me, that the word "son" in this will, should be read "any son." In the first place, the estate is to go to the daughter in a particular mode, when

(*a*) Cited in 1 Ventr. 230.

the testator says, "*Hamels* to go to my daughters, as follows." He then describes how it is to go, namely, "her son shall have it if she marry and have a son." He then describes in what way the daughter shall have it; and then suppose her son to have it, he could only take in that case by purchase, unless the will operated as a gift to the daughter, and not only to the daughter, but subsequently as a gift to that son, or to a subsequent son, so as to be doing away with the life estate to the daughter. The will goes on to state, "in case she marries and has a son, to go to that son; in case she has more than one daughter at her or her husband's death, to go to the eldest daughter." Now what did the testator mean there by the word "son?" If the word "son" can be construed, not as an immediate descendant, but as any son, whether immediate or remote, such as a grandson, or any one that would come under the general denomination of son, then all difficulty seems to me to be removed; for if it is so construed, then the limitation over to the eldest daughter would not take effect, even although the immediate son were dead, if there were a grandson living, or a great grandson, so that it would not exclude the male descendants of his daughter; but if the word "son" is confined to the immediate son, the effect would be, that if that son died, leaving sons, the estate, according to the strict construction of the words, would go over to the daughters. But if the word "son" means all manner of sons, then all the difficulty is removed.

The following certificate was afterwards sent to the Court of Chancery:—

This case has been argued before us, and we are of opinion that *Catherine Mellish* took an estate in tail male, with a reversion in fee, subject to other estates created by this will.

J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

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Where a person attending a public auction room, bid for a lot, and after having been declared the highest bidder, the article was immediately delivered to him, but in a few minutes afterwards he stated that he had been mistaken in the price, and refused to take it: Held, that it was a question of fact for the Jury, whether there was such an acceptance of the article as would take the case out of the statute of Frauds, so as to shew that it was the intention of both parties to be bound by the sale, no deposit upon the price having been made by the vendee agreeably to one of the printed conditions in the catalogue.

THIS was an action for goods sold and delivered, with the usual money counts. Plea, Non assumpsit. At the trial before *Abbott*, C. J., at the adjourned Sittings after last *Hilary* Term, the case was this:—The plaintiff, being an auctioner, had, on the 9th *July*, 1822, advertised for sale at his rooms a quantity of trinkets and other valuable property belonging to a jeweller. Among other articles was a pair of ear-rings described in the catalogue, as "a pair of magnificent cluster brilliant top and drop ear-rings." The defendant, who was a foreigner, and not conversant with the *English* language, was in the habit of dealing in pictures and jewellery, and frequently attended the plaintiff's auction rooms, and bought various articles put up for sale. On the day in question he attended the sale room, and bid for, and purchased several lots, which were knocked down to him. The ear-rings in question were put up in the order in which they were entered in the catalogue, and the defendant among other persons bid for them. During the biddings the defendant had the ear-rings in his hands, and examined them, and he being the highest bidder, they were at last knocked down to him at the price of 88 guineas, and were immediately delivered into his possession as the purchaser. He then made no objection; but in a few minutes afterwards, a person, who interpreted for him, informed the plaintiff, that the defendant said he was taken by surprise at the moment of the biddings; for that he thought his bidding was only 48 instead of 88 guineas; and also that he thought the stones with which the ear-rings were set were rubies, but found they were not; and therefore declined the purchase. The plaintiff immediately replied, that the defendant could not be under any mistake, or be taken by surprise, the last bidding having been distinctly announced three times, as usual, before the hammer fell; but

the defendant returned the ear-rings, and said he would not take them. The plaintiff consented to hold them on the defendant's account, but expressly stated to him that he considered the ear-rings as belonging to him, and that he should hold him responsible for the price at which they were knocked down. It appeared that the stones with which the ear-rings were set, were garnets, and not rubies; that if they were *Assyrian* garnets they would be worth about 50*l.*; but that if they were rubies they would be worth 88 guineas; but no distinct evidence was given as to the quality or value of the stones. One of the printed conditions of sale mentioned in the catalogue was, that the highest bidder should be declared the purchaser, and that upon being so declared, he should pay down 20*l.* per cent. upon the purchase money, and the rest of the price when the lot was removed. It was objected for the defendant, first, that inasmuch as he had misunderstood the bidding, and did not mean to purchase the ear-rings at the price at which they were knocked down to him, he was not bound to take them; and, second, that there was no delivery to, or acceptance of the ear-rings by him, to take the case out of the statute of Frauds. The Lord Chief Justice said it was for the jury to determine as a question of fact, whether the defendant labored under a mistake at the time he bid 88 guineas for the lot; but that if the jury should find that there was no mistake, he was of opinion, in point of law, that there was a sufficient acceptance to take the case out of the statute of Frauds. The jury found as a fact that there was no mistake as to the price, and therefore a verdict was entered for the plaintiff—Damages 92*l.* 8*s.*

*Scarlett*, in *Easter* Term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, and contended that there was no delivery and acceptance of the ear-rings to take the case out of the statute of Frauds. If a person attending an auction-room bids for an article under a mistaken idea of its value, and upon its

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being delivered to him he discovers either that it is not worth so much as he thought, or that it is not an article of the description which he supposed it to be, and he immediately declares his objection, and returns it to the auctioneer, the mere act of delivering it to him originally will not bind him to pay the price. The delivery and acceptance, to take a case of this description out of the statute, must be founded on a principle of mutuality, first, a willingness on the part of the vendor completely to divest himself of all property in the thing sold; and, second, a readiness on the part of the vendee to take to the property on the terms of the proposed sale, by paying or agreeing to pay the price. Now here there is no delivery or acceptance according to this definition. In the first place there could be no delivery here until the price was paid. By one of the conditions of sale the purchaser of a lot was bound to pay 20*l.* per cent. upon the sum at which it was knocked down, and he could not take away the article sold until the remainder of the price was paid. Supposing, therefore, that an article is knocked down to a bidder at an auction, and paying the price is a condition precedent to delivery, and he refuses to pay the price, can it be said that the mere act of knocking it down to him, and putting it into his hands, gives him such a property in the article as to entitle him to take it away? Surely not. The auctioneer would have a right to keep the article until the price was paid, and if the bidder took it away without paying for it, he would be a wrong-doer, and subject himself to an action of trover. On the other hand, if the bidder refuses to take the article, either for some objection to its price or quality, the auctioneer cannot force it upon him, and bring his action for goods sold and delivered. Suppose, again, that a person bids for an article at an auction, and, after delivery, finds that he has no money to pay for it, and he gives it back to the auctioneer, who takes it again, would not that make void the contract, and do away with the notion of acceptance? And yet that reasoning will apply to this case. The de-

fendant refuses to take the article, and returns it to the plaintiff, who keeps it, certainly under a protest, which however cannot affect the question as to an acceptance within the statute. An acceptance, to take the case out of the statute, must be such an acceptance as in the understanding of both parties is to bind both; that is, where the vendor agrees to part with, and the vendee agrees to take to, the property. Here it is not to be supposed that the plaintiff intended to part with the property until the price was paid, and it is quite clear that the defendant repudiates the contract, which he had a right to do for the reason assigned, and declines to accept the goods. It was for the jury at all events to decide as a question of fact, whether the plaintiff by the mere act of delivery meant to part with the possession and property in the ear-rings, and whether the defendant accepted them with an intention of vesting in himself a right of property in them. That question was not left to the jury, and therefore the defendant is entitled to a new trial (*a*).

The COURT granted a rule nisi, against which

*Gurney* and *Comyn* now shewed cause. The defendant "accepted" the goods in question, and "actually received the same," and therefore this case is within the very words of the 17th section of the statute of Frauds. Having once accepted, it was not competent for him to return them, and relieve himself from the liability to pay the price. If he once accepted he was concluded, and the length of time, whether short or long, during which he had possession can make no difference. Acceptance for a single instant, seems sufficient to divest the owner of the right of property in goods sold, according to the case of *Carter* v. *Toussaint* (*b*), where *Bayley*, J. is reported to have said "there can be no actual acceptance, unless there is a change of possession,—unless the seller does some act by which he divests himself

(*a*) See *Chaplin* v. *Rogers*, 1 East, 192, and *Blenkinsop* v. *Clayton*, 1 J. B. Moore, 328.

(*b*) Ante, vol. i. 515.

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of the possession, at least for an instant." By the mere act of acceptance these goods became the property of the defendant, and he is bound to pay for them. The defendant bids for them, they are knocked down to him, he accepts them without objection, retains them for several minutes, and then pretends that he has made a mistake as to the price. The Jury have found that there was no mistake in that respect, and therefore the defendant having accepted them, the case is *within* the statute. It is quite clear that the plaintiff had parted with the possession, considering the defendant as owner, and meaning to part with the property in the goods. After having parted with the possession, and the defendant having chosen to keep them, could the plaintiff have recovered them back? Clearly not. [*Holroyd*, J. Could the defendant have taken the goods away without paying the price according to the conditions of the sale? If not, then there was no delivery. You are to prove an acceptance according to the conditions of the sale.] The plaintiff might waive the right to be paid before the goods were taken away. Indeed, the act of delivery proves a waiver. [*Bayley*, J. Did it go to the Jury whether there was a complete acceptance?] It did in substance. [*Abbott*, C. J. I left the question of mistake as to the price; but I did not leave the question of acceptance to the Jury. Could there be a delivery without paying the deposit? *Bayley*, J. Merely having the articles in his hand is not a delivery.] The Jury have decided that. It is proved that the goods are in fact delivered to the defendant the moment he is declared to be the highest bidder, he keeps them in his possession as owner for several minutes without objection, and therefore he has accepted them within the meaning of the statute.

*Scarlett*, contrà, was stopped by the Court.

ABBOTT, C. J.—This case must go to a new trial. I think I ought to have left it as a question of fact for the Jury, whether the delivery of the goods by the plaintiff to

the defendant, was made with an intention of parting with the possession, and whether the defendant accepted the goods with the intention of acquiring the right of possession as owner. These two circumstances must concur in order to satisfy the requisites of the statute, and the onus lies upon the plaintiff to shew that there was such a delivery and acceptance.

BAYLEY, J.—By the conditions of sale a deposit of 20*l.* per cent. was to be paid upon the party being declared the highest bidder, and the remainder of the purchase-money when the goods were removed. Now can we presume a delivery with an intention to part with the possession, contrary to the conditions of sale? Here there was no deposit, nor payment of any part of the price, manifesting an intention on the part of the defendant to accept the goods as his own. The mere delivery of the ear-rings into the defendant's hands, the moment he is declared the purchaser, is very slight evidence of an intention to part entirely with the possession, because it was competent to the plaintiff to prevent the defendant taking them away until the price was paid. I think, therefore, that it was at least doubtful, whether the plaintiff intended to part with them so as to give the defendant a complete right of possession as owner. Then as to the supposed acceptance; the defendant is a foreigner, he may have mistaken the price, and in fact in a very few minutes after the goods are knocked down to him, he declares that he was mistaken, and refuses to accept. I think, that, retaining them for so very short a period in his possession was by no means conclusive evidence of his intention to accept them as owner. Under these circumstances, I think the case ought to go to another trial to determine the intention of both parties, as a question of fact.

HOLROYD, J. concurred (*a*).

Rule absolute.

(*a*) *Best*, J. was sitting at Nisi Prius.

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TO THE

# PRINCIPAL MATTERS.

## AMBASSADOR.

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the Court refused to quash the writ, though the husband swore, that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon *him*, in writing despatches and other official documents. *English* v. *Caballero*, 4 *G.* 4. *Page* 25

## ANNUITY.

1. Where the memorial of an annuity-deed described one of the subscribing witnesses to the warrant of attorney, by the initial of his christian name, instead of setting it out at length:—Held, not a compliance with 53 *Geo.* 3. c. 141. s. 2. and the warrant of attorney set aside. *Check* v. *Jefferies*, 4 *G.* 4. 185
2. Where the grantor of an annuity assigned a policy of insurance on his own life to the grantee, whereby the latter was enabled to insure the life of the former, at a less *premium* than he otherwise might have done:—Held, that such assignment was no part of the consideration, and need not have been set out out in the memorial under 53 *Geo.* 3. c. 141. s. 2. the other requisites of that statute having been complied with. *Morris* v. *Jones*, 4 *G.* 4. 203
3. The 53 *Geo.* 3. c. 141. requires, that in the memorial of an annuity, the "nature of the instrument" by which it is secured, shall be set forth.—Where the memorial of an annuity described the instrument by which it was secured, "as an *assignment* of certain hereditaments," and it appeared, that in fact the instrument was an *underlease*:—Held, that in popular language, the instrument was sufficiently described. *Butler* v. *Capel*, 4 *G.* 4. *Page* 485

## APPEAL.

*See* CERTIORARI, 1, 2.—NOTICE OF APPEAL, 1.

1. Where a clause in a private inclosure act, gave an appeal to any person aggrieved by any thing done in pursuance of that act, "except as to such acts, determinations, or proceedings *of the commissioners*, as by the general inclosure act were directed to be final and conclusive;" and an order was made by a commissioner and *a magistrate* jointly, for stopping up a private road set out under the local act:—Held, that an appeal lay to the Sessions against such order, there being nothing in the general inclosure act which rendered the decision of *justices* final and conclusive. *Rex* v. *The Justices of the West Riding of Yorkshire*, 4 *G.* 4. 306
2. Where an appeal was entered at the *Easter*, and respited until the *Midsummer* Sessions, and on the 24th *June*, a copy of the order of respite was served on the respondents, without any notice of trial, and the respondents appeared at the following Sessions in *July*:—Held, that the Sessions were bound to hear the appeal, though no other notice of trying the appeal had been given, than the service of the order of respite. *Rex* v. *The Inhabitants of Lambeth*, 4 *G.* 4. 340
3. Where the Sessions, on appeal, quashed an order of removal, on the ground of its appearing that

the pauper had not been *adduced and examined* before the removing Justices, touching his settlement; and it not being stated, that the pauper had not been *summoned* before the removing Justices; this Court quashed the order of Sessions, and directed a re-hearing of the appeal. *Rex* v. *The Justices of Tavistock*, 3 *G*. 4. *Page* 427

## APPOINTMENT.

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*See* BANKRUPT, 4.—VARIANCE, 1.

## ASSIGNMENT.

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## ASSUMPSIT.

*See* LEASE, 1.—PLEA, 1.

*A*. sells goods to *B*. in *America*, to be shipped for an *European* port, and paid for by bills in different sets, and at different dates, drawn by *B*. in favor of *A*. upon *C*. and *Co*., a mercantile house in *London*. *D*. is appointed supercargo, and joint trustee, by *A*. and *B*. for securing remittances to the house in *London*, for the honor of the bills. The goods being shipped for *Europe*, *B*. and *D*. respectively advise *C*. and *Co*. of the transaction, who effect insurance upon the cargo by *B*.'s direction, and at his expence. The ship on her voyage, is captured, and *B*. abandons the cargo to the underwriters, as for a total loss, the amount of which is paid to *C*. and *Co*. in *London*, who place it to the credit of *B*. The *London* house honor the first set of bills, before any fruits are received from the policy, and advise *A*. of that fact, in consequence of a letter received from him upon the subject of the bills, informing him that they could then say nothing about the other bills, as the fate of them would depend (not being accepted) upon the state of *B*.'s account when they became due; with an assurance, however, that they would do every thing they could with propriety, to further the views of all parties. By a subsequent letter, they advise him of the payment of a second set, stating that they did not know what would be the fate of the third, which had not then appeared for acceptance; but that they would do all they could to prevent loss to the parties. Part of the remaining set of bills is subsequently paid, but the rest is refused payment by *C*. and *Co*. *B*. becomes bankrupt, and *C*. and *Co*. account with him prior to, and with his assignees, subsequent to his bankruptcy, for all the money ever received by them, on his account. *A*. receives under *B*.'s commission, a dividend upon the bills remaining unpaid: and for the balance his administrator brings an action for money had and received against *C*. and *Co*.:—Held, that the action was not maintainable. *Neile* v. *Reid*, 4 *G*. 4. *Page* 158

## ATTORNEY.

*See* OUTLAWRY, 1.—PRACTICE, 11.

1. An attorney's bill may be referred for taxation after verdict for the full amount. *Nuttall* v. *Marr*, 4 *G*. 4. *Page* 33
2. An attorney employing an agent to do business for his client, is primarily liable to the agent for his bill, though the latter knows the business to be done for the client; but to whom the credit is given, is a question for the Jury. *Scrace* v. *Whittington*, Gent. 4 *G*. 4. 195
3. If there is reasonable and probable cause for coming to the Court against an attorney, although it shall turn out that there is no actual foundation for imputing misconduct to him, the Court will not give him his costs of the application. *Doe* d. *Thwaites* v. *Roe*, 4 *G*. 4. 226
4. The Court struck two attornies off the roll, for knowingly permitting an unqualified person to practice as an attorney in their names, for his own profit, and contrary to 22 *Geo*. 2. c. 46. and sentenced the unqualified person to be imprisoned for three months in the prison of the Court. The latter being previously a prisoner for debt, was ordered by the Court to be brought up without a day rule, on a suggestion that he was unable to pay the expence of a day-rule. *In re Clark and others*, 4 *G*. 4. 260

## AUDITORS.

*See* ACCOUNT.

## AUTHORITY.

*See* VARIANCE, 1.

## AWARD.

*See* COVENANT, 1.

1. An award against trustees and guardians of an infant, tenant for life of the realty, who died before the award was made, is not binding. *Bristow* v. *Binns*, 4 *G*. 4. *Page* 184
2. An order of nisi prius, referring an action of debt on a money bond (where the issue was payment by a co-obligor), *and all matters in difference* to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the Court refused to set aside an award, directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out, without proof that there were other matters in difference between the parties. *Cayme* v. *Watts*, 4 *G*. 4. 224
3. Declaration stated that plaintiff and defendant, by articles of agreement, submitted themselves to the award of *J. T.*, *J. R.*, and *T. C.*, concerning several matters therein recited, namely, that plaintiff, defendant, *G. A.*, and *D. A.*, had brought and defended several suits originating in one transaction; that in one of them the assignees of *J. T.*, a bankrupt, had recovered against the present plaintiff 2,500*l*.; that disputes existed between the present plaintiff and defendant respecting the value of the stock and goods which they had respectively received from a certain farm, and respecting the proportion of the 2,500*l*., to be paid by each of them under an agreement made between them before the trial; and also re-

specting the costs of bringing and defending the several suits aforesaid); that the arbitrators having taken the said matters into consideration, awarded that defendant should pay to plaintiff 444*l.*; that plaintiff should pay five-eighths, and defendant three-eighths of the costs of the said several suits; that the money already paid by either of them should be considered as part payment of his proportion; and that upon payment of the 444*l.* and the costs, mutual releases should be executed:—Held, on demurrer, that plaintiff might recover; for nothing appearing on the record to shew that the arbitrators had not taken *all* the matters into consideration; and as plaintiff, being originally liable for the whole 2,500*l.*, must continue liable for all except the 444*l.* awarded to him; the first part of the award was sufficiently certain:—Held also, that the second part of the award was sufficiently certain, because it would be made so by the taxation of the costs by the master; and that it would also be final if no dispute existed respecting the amount of the money already paid; and that if such dispute did exist, or if the arbitrators had neglected to consider any of the matters submitted to them, defendant should have pleaded the fact instead of demurring. *Cargey* v. *Aitcheson*, 4 *G.* 4. *Page* 433

4. Declaration in debt on a joint and several bond, in the penal sum of 1000*l.*, conditioned for the performance of an award to be made on or before the 1st *February*, averred, that before that time expired, the parties to the bond by deed poll indorsed on the back of the bond, agreed to give the arbitrators further time, till the 1st *March*, to make their award; and that the award was accordingly made within the enlarged time, but not performed by the parties against whom it was made:—Held, on demurrer, that debt was maintainable upon the bond. *Greig* v. *Talbot*, 4 *G.* 4. *Page* 446

5. Where a verdict was taken by consent in an action for diverting a water-course, subject to the award of an arbitrator, to whom, by order of nisi prius, all matters in difference were referred, with liberty to him to regulate the future enjoyment of the water, according to the respective rights of the parties, and one of the parties died before the award was made:—Held, that the arbitrator's authority was thereby revoked, and the Court set aside an award made subsequently. *Rhodes* v. *Haigh*, 4 *G.* 4. 603

6. If the verdict and judgment will embrace matters in difference submitted to an arbitrator, under an order of nisi prius, the death of either of the parties before award will not revoke the submission; but *aliter* if the verdict and judgment do not embrace all matters in difference. *Bower* v. *Taylor*, 4 *G.* 4. 610

## BAIL.

*See* OUTLAWRY, 1.—TRANSPORTATION.

1. After bail had been opposed and allowed, it was discovered that one of them had, on a former occasion, been rejected for insufficiency; and though he had since become a person of property, the Court set aside the rule for allowance. *Pickard* v. *Dobson*, 4 *G.* 4. 5

2. Defendant having been arrested on 27th *March*, on a writ return-

able the 16th *April*, became bankrupt on 3d *April*, and obtained his certificate on 26th *June*:—Held, that as the bankruptcy took place before the bail-bond was forfeited, the debt was proveable under the commission, and consequently the bail were discharged. *Littlewood* v. *Crowther*, 4 *G*. 4. *Page* 533

## BAIL BOND.

*See* Peerage.

## BAKERS.

*See* Certiorari, 2.

## BANKER.

1. *A*. and *B*. and *Co*., country bankers, have a cash account with *C*. and *Co*., *London* bankers, who are in the habit of transmitting to the former, monthly statements of mutual debts and credits. *A*. dies, leaving a large balance due from himself and partners to *C*. and *Co*., who, for two months afterwards, make no alteration in their *own* books as to the mode of keeping the account, but continue it as before. In the interval, money is transmitted to *C*. and *Co*. from the country bank, sufficient to pay off the balance due from the firm at the time of *A*.'s death. During the two months no accounts are transmitted to the country bank, but, at the end of that time two separate accounts are sent; one called the old account, made up to the death of *A*., without giving credit for the money received since his death, in liquidation of the balances at that time due from the firm; and the other called the new, comprising the two months, giving credit for the sums received during that period. In action by *C*. and *Co*. on a joint and several indemnity bond, given by *A*. and *B*. against the heirs of *A*., for the balance due at his death:—Held, that *C*. and *Co*. by continuing their own private account against *A*. and *B*. for two months after the death of *A*., as theretofore, were not estopped from suing his heirs. *Simpson* v. *Ingham*, 4 *G*. 4. *Page* 249
2. Where the customer of a country banker was in the habit of paying in, bills of exchange, which were never written short, but entered to the full amount on the day they were paid in, in the pass book, and also in the books of the bank, to the credit of the customer, as "bills" (not as "cash"), and, after such entry, the customer was at liberty to draw to the full amount by checks, and the bankers became insolvent, having in their possession several of the customer's bills so paid in, and the assignees having converted the same to their use:—Held, that the customer (who had a cash balance in his favor at the time of the bankruptcy) might maintain trover against the latter for the amount, there being no evidence that he had, in point of fact, agreed that when the bills were paid in, they were to become the property of the bankers. *Thompson* v. *Giles*, 4 *G*. 4. 733
3. *Semble*, that a custom for bankers to use bills so deposited, by paying them away in the course of their banking business, is not good in point of law, and certainly cannot bind the customer without his express assent. A banker, however, may negociate bills deposited by his customer, to such

an extent as the necessary demands of the latter may require, without his express authority. *Thompson* v. *Giles*, 4 *G*. 4. *Page* 733

## BANKRUPT.

*See* Bail, 2.—Banker, 2.—Commissioners.—Partners, 1.—Pleading, 2.—Trover.

1. A certificated bankrupt is a competent witness to prove the signatures of the commissioners to the proceedings under his commission. *Morgan* v. *Pryor*, 4 *G*. 4. 215
2. Insolvency, within the meaning of the bankrupt laws, does not mean an inability to pay 20*s*. in the pound when the affairs of a bankrupt shall be ultimately wound up; but a trader, is in insolvent circumstances when he is not in a condition to pay his debts in the usual and ordinary course of trade and business. *Shone* v. *Lucas*, 4 *G*. 4. 218
3. *A*. and *B*. having dissolved partnership, an award was made between them, by which *B*. was directed to pay *A*. a sum certain, and to pay several partnership debts. *B*. gave a warrant of attorney for securing the money awarded, with a stipulation in the defeasance, that if *A*. should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. *B*. became bankrupt, and *A*. proved his private debt under the commission, and received a dividend thereon. *A*. was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment, and took out execution on the warrant of attorney, before *B*. had obtained his certificate:—Held, that *A*. was not deprived of his remedy by 49 *Geo*. 3. c. 121. s. 8 and 14. *Dally* v. *Wolferston*, 4 *G*. 4. *Page* 271
4. Property acquired by an uncertificated bankrupt, after bankruptcy, does not absolutely vest in his assignees by virtue of the assignment, although they may claim it; but if they remain passive, and do not interfere, he has a right to such property against all other persons. *Drayton* v. *Dale*, 4 *G*. 4. 534
5. Where a debtor of an uncertificated bankrupt made a promissory note, payable to the bankrupt, "or his order," in discharge of a debt contracted before bankruptcy, and the bankrupt indorsed it for a bonâ debt to *A*., who indorsed it to *B*. for valuable consideration, and *B*. sued the maker:—Held, first, that the maker, by the terms of his note, was estopped from saying, that the bankrupt had no authority to indorse; and, second, that the assent of the assignees was not necessary to enable the bankrupt to negociate the note by indorsement. *Id. ib.*
6. Where *A*. the dormant partner of *B*. in a trading firm, allowed the latter, on the dissolution of the partnership, to remain in the order and disposition of the partnership property, effects and debts; and *B*. after continuing in trade for about two years afterwards on his sole account, became bankrupt:—Held, that *A*.'s share of the partnership property and effects, and of the debts due on the partnership account at the time of the dissolution, passed to *B*.'s assignees under 21 *Jac*. 1. c. 19. s. 11. *In re Gilpin*, 4 *G*. 4. 636

## BARON AND FEME.

*See* PRACTICE, 8.

## BATH.

*See* REQUESTS, COURT OF.

## BILL OF EXCHANGE.

*See* DEBT.—GUARANTY.—INSOLVENT, 1.—STAMP, 2.

1. A bill of exchange, drawn 21st *December*, at two months, for 30*l*. on a two-shilling stamp, and altered on the same day before the acceptance, to the 31st *December*, does not require a half-crown stamp within the 55 *G.* 3. c. 184. *Upston* v. *Marshall*, 4 *G.* 4. *Page* 198

2. Where a foreign bill of exchange was drawn by *A.* upon and accepted by *B.* payable to the order of *C.* and a person representing himself to be *C.* indorsed the bill to *D.*, for value, and the indorsement, as was alleged, turned out to be forged:—Held, in error, that in action by the indorsee, against the acceptor, it was unnecessary to give positive proof of the identity of the indorser, as the person to whom the bill was really payable, primâ facie evidence being sufficient. *Semble*, that if such evidence is objected to as insufficient, the proper course for taking advantage of the objection is on demurrer, and not by bill of exceptions. *Bulkeley* v. *Butler*, 4 *G.* 4. 625

3. *A.*, after drawing a bill of exchange, on *B.*, which was accepted by the latter, indorsed it to *C.*, who re-indorsed it to *A.* in pursuance of an agreement, (without consideration) that he should do so, as security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable. On demurrer to a declaration against *C.*, upon the bill, in the usual form, alleging the special circumstances under which the defendant became indorser:—Held, first, that the action could not be maintained on the bill; and, second, that the agreement to indorse was void for want of consideration. *Britten* v. *Webb*, 4 *G.* 4. *Page* 650

## BOND.

*See* AWARD, 4.—ESCROW.

1. A surety bond by three for the payment of 1000*l*. worded "for which payment to be well and faithfully made, we bind ourselves, and *each* of us for himself, for the whole and entire sum of 1000*l*. each;" is a several, and not a joint and several bond, and may be enforced against the obligors, severally. Tearing off the seal of one of the obligors of such a bond does not avoid it as against the others; and if the obligor, against whom it is enforced, is entitled to contribution, it seems his remedy is in equity only. *Collins* v. *Prosser*, 4 *G.* 4. 112

2. A bond executed with the usual formalities may operate as a deed in præsenti, though at the time of execution it is expressly agreed that it shall not take effect, until a certain event has happened. *Murray* v. *Earl Stair*, 4 *G.* 4. 278

3. Where the obligor of a post obit bond craves oyer thereof, and sets out the condition, it is not necessary for the obligee to aver the death of the person at whose decease the money is to become payable. *Id.* *ib.*

4. A bond conditioned for the payment of 2000*l*. by *A.* to *B.*, *six calendar months next after the death of C.*, is not within 8 & 9 *W.* 3. c. 11. s. 8. requiring the sugges-

tion of breaches. It seems that such a bond is within the 4 & 5 *Ann.* c. 15. *Myrray* v. *Earl Stair*, 4 *G.* 4. *Page* 278

## BREACHES.

*See* Bond, 1.—Escrow.

## BRIDGE.

Indictment for not repairing a bridge, described as situate within the parishes of *P.* and *M.* and averring, that the inhabitants of *P.* and the inhabitants of the township of *M.* were liable to repair, without going on to state what part of the bridge was situate within the township of *M.* and that the inhabitants thereof were liable to repair, is erroneous. *Rex* v. *The Inhabitants of Penegges*, 4 *G.* 4. 388

## CARRIER.

Plaintiffs declared against defendants on their common law liability as carriers, for the loss of a parcel, and it appearing that the course of dealing between the parties was for plaintiffs to pay defendants an annual sum for the carriage of parcels, between *L.* and *D.*, and on the receipt of each parcel defendants were in the habit of delivering to plaintiffs a written acknowledgment, stating that they undertook to deliver the same as directed, "fire and robbery excepted;" and the jury having found that this was the contract between the parties, though the loss was occasioned by negligence only: Held, a fatal variance. *Latham* v. *Rutley*, 4 *G.* 4. 211

## CASE.

*See* Evidence, 5.—Way.

1. Declaration in case against a clerk of the Insolvent Debtors' Court, for wrongfully, maliciously, falsely, and unlawfully making out an order, purporting to be an order of that Court for the discharge forthwith of an insolvent debtor, who was adjudged by the Quarter Sessions to be detained in custody for two years at the suit of plaintiff, with an averment that the Insolvent Debtors' Court did not pronounce any such order, or give any authority to the defendant to write, make out, or issue the same, whereby the prisoner was discharged forthwith, and by means whereof plaintiff was injured, and had lost all means of enforcing payment of the debt, and costs due to him from the prisoner.—Error being brought on the judgment of *C. P.*:—Held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that Court until set aside, and that the declaration was not demurrable for not averring that the supposed order was in fact set aside. *Whitelegg* v. *Richards*, 4 *G.* 4. *Page* 237

2. Where negroes in a state of slavery, in a colony of *Spain*, escaped from their master's plantation, and took refuge, and were received on board a *British* vessel of war, whilst she was stationed at an island captured by his Majesty's arms from the United States in time of war; and after notice given to the officers commanding on the station, that they were run-away slaves, the officers carried them to, and left them at, a *British* colony:—Held, that case would not lie in this country against the officers for harbouring and detaining such negroes, even though by the lex loci, whence they escaped, slavery was permitted. *Forbes* v. *Cochrane*, 4 *G.* 4. 679

## CERTIORARI.

*See* Highway, 2.

1. A certiorari always lies to remove proceedings under penal statutes, unless it is expressly taken away; and an appeal never lies unless it is expressly given by the statute. *Rex* v. *Cashiobury*, 4 *G.* 4. *Page* 35
2. The 50 *Geo.* 3. c. 73. reciting 31 *Geo.* 2. c. 29. 3 *Geo.* 3. c. 6. and 13 *Geo.* 3. c. 62. makes certain amendments in the laws then in force respecting the trade of bakers, &c.; and by sect. 5. all powers given by the previous statutes upon the same subject are incorporated, except those altered by that statute. The 31 *G.* 2. c. 29. ss. 36. & 37. respectively take away the writ of certiorari, and give an appeal to the Sessions: — Held, that 50 *Geo.* 3. c. 73. s. 5. incorporates those sections; and that on a conviction under the latter statute, the certiorari is taken away, and an appeal given. *Rex* v. *The Mayor of Liverpool*, 4 *G.* 4. 275
3. Certiorari refused to remove an indictment of murder from *Yorkshire*, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded to the indictment) could not have a fair and impartial trial in the former county. *Rex* v. *Mead*, 4 *G.* 4. 301

## CHARTER.

*See* Corporation, 2.

## CHARTER-PARTY.

*See* Principal and Agent, 1.

## CHURCHWARDENS.

In the parish of *B.*, consisting of the township of *B.* and several hamlets, two churchwardens were appointed by the township, and two by the rest of the parish, who made separate rates for their own divisions respectively: Held, that the acting churchwardens for the township might maintain assumpsit against their predecessors for a balance remaining in their hands, without joining the other churchwardens, as plaintiffs or defendants, and without proving that their appointment was strictly legal. *Astle* v. *Thomas*, 4 *G.* 4. *Page* 492

## COMMISSIONERS.

Where a bankrupt was, after repeated examinations, finally committed by the commissioners for not satisfactorily answering, the Court granted a mandamus conditionally to the commissioners to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of fully disclosing his estate and effects. *In re Bromley*, 4 *G.* 4. 310

## COMMITMENT.

*See* Ecclesiastical Jurisdiction, 1.

## COMMITTITUR.

*See* Practice, 11.

## CONSIGNOR AND CONSIGNEE.

*See* Stamp, 2.

## CONTRIBUTION.

*See* Bond.

## CONTUMACY.

*See* Ecclesiastical Jurisdiction, 2.

## CONVEYANCE.

*See* STAMP, 1.—VENDOR & VENDEE, 1.

A deed of conveyance which omits truly to set out the whole consideration directly, or indirectly paid, or agreed to be paid, for the estate conveyed, is not void by 48 *G.* 3. c. 149. s. 22. Therefore in ejectment for a forfeiture, where a lease was supposed to have omitted part of the consideration:—Held, that this was no answer to the action. *Doe* v. *Hobson*, 4 *G.* 4. *Page* 186

## CONVICTION.

*See* CERTIORARI, 1, 2.—HABEAS CORPUS, 1.—HAWKER, 2.

1. This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself. *Rex* v. *Cashiobury*, 4 *G.* 4. 35
2. A conviction on 24 *Geo.* 3. c. 47. s. 1. which subjects vessels having foreign spirits on board to forfeiture, when found hovering, &c. within the limits of a port of this kingdom, must shew on the face of it, that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, &c. *Ex parte Hawkins*, 4 *G.* 4. 209
3. A conviction on 45 *Geo.* 3. c. 121. s. 7. for carrying and conveying foreign brandy in half ankers, alleged to be "*then and there liable to forfeiture*, the said offence being committed, against the provisions of the acts for the prevention of smuggling," is insufficient, in not shewing the particular grounds of forfeiture. *Ex parte John Smith*, 4 *G.* 4. 461
4. A conviction under 11 *Geo.* 1. c. 30. s. 16. for knowingly harbouring, and concealing smuggled spirits, cannot be supported by evidence of finding the smuggled spirits concealed in the house of the party convicted, unless he was present at the time of the finding, or some other direct proof be given of a guilty knowledge. *Ex parte Ransley*, 4 *G.* 4. *Page* 572

## COPYHOLD.

*See* WARRANT OF ATTORNEY.

## CORONER.

*See* JURY PROCESS, 1.

## CORPORATION.

1. Where the charter of a corporation, consisting of a mayor, and twenty-four capital burgesses, granted, that when, and so often as it should happen that any one or more of the twenty-four capital burgesses should die, or dwell without the borough, or should from any cause be removed, that then, and so often it should and might be lawful to the other capital burgesses "*at that time surviving and remaining*, or *the greater part of the same*," of whom the mayor for the time being shall be one, to elect another, &c. and a burgess having been elected to fill up a vacancy (occasioned by death) by *twelve capital burgesses only*, who were alleged to be the capital burgesses, *at that time surviving and remaining*:—Held, that the election was void, not being made by a majority of the *whole* definite body to which the words "Or the greater part of *the same*," were referable. *Rex* v. *Wyllyams*, 4 *G.* 4. 75

2. Where a modern charter of an ancient borough contained a clause expressly disqualifying certain persons from voting for corporate offices, but at the same time ratified and confirmed the ancient usages of the borough, by which certain other, and different persons were also disqualified from voting at any nomination, or election of corporate officers, and a person was elected to a corporate office in pursuance of the words of the charter, but not conformable to the ancient custom:—Held, that his election was void. *Rex* v. *Abell*, 4 *G.* 4. *Page* 390

## COSTS.

*See* ATTORNEY, 3.—PRACTICE, 2.

A plaintiff declared in assumpsit against trustees of a turnpike road, *generally*, went to trial, withdrew his record, and, after suffering himself to be non prossed, sued the same trustees a second time, *by name*, for the same cause of action, and the Court refused to stay the proceedings in the second, until the costs of the first action were paid. *Pashley* v. *Poole*, 4 *G.* 4. 53

## COVENANT.

*See* INTEREST, 1.—PLEADING, 1. VARIANCE, 1.

1. In covenant for not setting out tithes of certain garden ground, defendant pleaded an inclosure act, by which the plaintiff received an allotment of waste lands in the parish, in lieu of the tithes, but omitted to allege that the commissioners under the inclosure act had made their award in pursuance thereof, and after a finding for the defendant by the Jury upon an issue of fact; the Court entered judgment for the plaintiff, non obstante veredicto. *Ellis* v. *Arnison*, 4 *G.* 4. *Page* 27

2. In a lease, for years for a messuage, and premises in a public street, lessor covenanted that lessee, his executors, &c. should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business *that may be, or grow, or lead to be offensive*, or *any annoyance or disturbance to*," any of the other tenants of lessor, &c. Lessee granted an under lease of the premises (subject to the like covenant) to *A.* who opened them in the business of a *licensed Victualler*, which was not one of the businesses enumerated in the covenant:—Held, that by such acts, the covenant was not broken. *Jones* v. *Thorne*, 4 *G.* 4. 152

## COURT.

*See* CASE, 1.

## COURT-LEET.

An immemorial custom, for the steward of a manor to *nominate* the Jury to serve, on the Court-leet, at the election of the mayor of a borough is good in law. Twenty years usage, uncontradicted, is cogent evidence for the Jury to presume, that such a custom is immemorial. *Rex* v. *Jolliffe*, 4 *G.* 4. 240

## CUSTOM.

*See* BANKER, 2.—CORPORATION, 2.—COURT-LEET.

## DAY RULE.

*See* ATTORNEY, 4.

## DEBT.

*See* AWARD, 4.—INFANT.

Debt lies by the drawer against the acceptor of a bill of exchange

expressed to be for value received in goods. *Priddy* v. *Henbrey*, 4 *G.* 4. *Page* 165

## DEED.

*See* ESCROW.—EVIDENCE, 1.

## DEMURRER.

*See* AWARD, 4.—BILL OF EXCHANGE, 2.—PLEADING, 2.

## DESERTION.

*See* HABEAS CORPUS.

## DEVISE.

1. A testator devises his lands charged with two annuities, and subject to certain legacies, to trustees, their *heirs and assigns*, until his nephew *J.*, son of his sister *M.* should attain twenty-one; and if he should die in the mean time, until *H.* second son of *M.* should arrive at that age; and if *H.* should die in the mean time, until the daughter of *M.* should arrive at that age, upon trust to raise out of the rents of the premises, or by sale or mortgage thereof portions for *H.* and the younger children of *M.* payable on their attaining twenty-one; and further to apply a proper sum out of the rents for the maintenance and education of *J.* until he should attain twenty-one; and then to pay him the residue; and if he should die before twenty-one, then to apply a like sum for the maintenance of *H.* till he should attain that age; and then to pay him the residue; and in the mean time to place out the money arising from the rent at interest for the benefit of *J.*, and when *J.* should attain twenty-one, or in case of his death, when, and as soon as *H.* should arrive at that age; or in case of his death, when the daughter of *M.* should attain twenty-one, to the use of *J.* and his assigns for life without impeachment of waste; remainder to trustees to preserve contingent remainders; and after the death of *J.* to the use of his first and other sons and daughters in strict tail; and for default of such issue, to the use of *H.* with similar limitations over to his niece, the daughter *M.* and an ultimate remainder to *M.* in fee. Testator died, leaving his sister *M.* her sons *J.* and *H.*, and three younger children, alive. *J.* married, and died intestate under twenty-one, leaving a daughter: Held, first that the trustees took only a chattel interest in the estates devised to them; second, that on the death of the testator, *J.* took a vested estate for life; third, that the daughter of *J.* took an estate in tail male, on the death of her father; and fourth, that *H.* took at testator's death a vested estate for life in remainder expectant on the death of his brother *J.* and failure of sons and daughters to be born to *J.* and issue male of such sons and daughters. *Warter* v. *Hutchinson*, 4 *G.* 4. *Page* 58
2. *T. M.* by will gave, devised, and bequeathed to three trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout several legacies and annuities, and for other the purposes in his will mentioned. He then gave legacies and annuities to a considerable amount, and directed that

the annuities should be payable out of his 26,400*l.* three per cent. consols. The case found that a large surplus of the personal estate remained after paying the debts, legacies, and annuities; but did not find that the legacies were really paid, or that the annuitants were either satisfied, or dead. He then devised as follows:—"All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to at the time of my decease, I do give, devise, and bequeath unto my three nieces *E. M.*, *M. M.*, and *C. M.*, equally to be divided among them, *share and share alike, for and during the term of their natural lives.* And from and after the decease of them, or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, &c. *for life in like manner.* And if either of my nieces shall happen to die in the life-time of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid shall go to and be shared and divided equally between the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate for and during the term of her natural life. And from and after her decease the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint-tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then, from and after the decease of the survivor of them without issue as aforesaid, I give the whole of such residue to my next male heir of the name of *M.*, to hold to him, his heirs, executors, and administrators, in manner aforesaid." Two of the trustees were dead; all the nieces were living: two of them had no children, the other had one child, a son, *G. B.*, and it being a question what estate these parties severally and respectively took under the will, it was held, 1st. That the surviving trustee now has a fee-simple in the freehold, and an absolute interest in the leasehold estates. 2d. That the testator's three nieces took no legal estate under the will. 3d. That *G. B.* took no estate under the will. 4th. That in case the will had commenced with the words "all the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute

interests in the leasehold. 5th. That *G. B.* would now have no estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them should have any other child, he will be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the life-time of the three nieces, he would die seised of no freehold, nor possessed of any freehold estate. *Murthwaite* v. *Jenkinson*, 4 *G.* 4. *Page* 764

3. Testator devised his estate called *H.* to his daughter in these terms, "*H.* to go to my daughter *C. M.* as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother *W. M.*:" Held, that *C. M.* took an estate in tail male with a reversion in fee, subject to the other estates created by the will. *Mellish* v. *Mellish*, 4 *G.* 4. 804

## DISCONTINUANCE.

*See* Practice, 2.

## DISTRESS.

*See* Taxes, 1.

## ECCLESIASTICAL JURISDICTION.

1. A spiritual judge has no jurisdiction over the *trustee* under a testator's will; therefore where a trustee was committed upon a writ de contumace capiendo, under 53 *Geo.* 3. c. 127, for not exhibiting an inventory and account of the goods of the testator, the Court ordered him to be discharged. *Rex* v. *Jenkins*, 4 *G.* 4. *Page* 41

2. Where a writ de contumace capiendo issued under 53 *Geo.* 3. c. 127. signified, "that the defendant was pronounced guilty of a contempt of the law and jurisdiction ecclesiastical, in not having obeyed a decree made upon him, to perform the usual penance in the parish church of *St. M.*, in a certain cause of defamation;" and it appeared, that at the time sentence was pronounced, a schedule of penance was made out, but which, by the practice of the Ecclesiastical Court, could not be delivered to the defendant, until he had paid costs of suit:—Held, that he ought to have had the decree exhibited to him, in its more perfect form, before he could be in contempt; especially as nothing was said in the significavit about costs. *Rex* v. *Maby*, 4 *G.* 4. 570

## EJECTMENT.

*See* Conveyance.—Evidence, 4. Notice to quit.—Practice, 7.

## ELECTION.

*See* Corporation, 1, 2.—Hundred, 1.

## ELEGIT.

*See* Warrant of Attorney.

## EQUITY.

*See* Bond, 1.—Settlement, 1, 3, 13.

## ERROR.

*See* Bridge.—Case, 1.—Highway, 3.—Transportation.

## ESCROW.

*See* BOND.

Where a bond executed with the usual formalities was delivered (by mutual agreement between the obligor and obligee), into the hands of the subscribing witness, there to remain "until the death of *A.*," who was named in the condition, "and until certain securities were returned to the obligor:"—*Held*, that it was for the *Jury* to determine whether the bond was delivered as an escrow or as a deed. *Murray* v. *Earl Stair*, 4 *G.* 4. *Page* 278

## ESTATE.

*See* SETTLEMENT, 1, 3, 13.

## ESTOPPEL.

*See* BANKER, 1.—BANKRUPT, 4.

## EVIDENCE.

*See* BANKRUPT, 1.—BILL OF EXCHANGE, 2.—LEASE, 1, 2, 3.—LIMITATIONS, STATUTE OF, 2, 3, 6.—NOTICE TO QUIT.—RECOVERY.

1. *A.*, by deeds of assignment and bargain and sale, assigned and sold respectively, an unexpired lease of premises, and the fee-simple of a messuage, &c. to *B.*, and in each instrument recited that he had received the purchase-money, and on the back of each wrote a receipt for the purchase-money in full. After which a memorandum of agreement, not signed or stamped, was drawn up between the parties, reciting that *B.* had lately purchased of *A.* the premises in question, and that *A.* being indebted to *B.* in the sum of 100*l.* had agreed that the same should be considered as part-payment of the said purchase-money; but it being understood, that in case the dividend about to be paid by *A.* to his creditors, should not amount to 20*s.* in the pound, then *A.* was to do work for *B.* in his line of a builder to the amount of such deficiency: and further, that *B.* was to retain in his hands the sum of 60*l.*, to be also considered as part-payment of the said purchase-money, and for which said sum *B.* was to do and perform work for *A.* in his line of a plumber and glazier. Indebitatus assumpsit being brought by *A.* to recover the money actually due to him as the purchase-money of the premises in question, the declaration alleging that the sum was due for and in respect of divers tenements, &c. sold by plaintiff to defendant, and thereupon, in consideration that plaintiff would take the work and labour of defendant as a plumber and glazier, at reasonable prices, to the extent of the said debt, in payment and satisfaction thereof, defendant undertook to do and perform for plaintiff all such work and labour as he might require, to the extent of the said debt; averring readiness of plaintiff to receive the work, and refusal of the defendant to perform it:—*Held*, that neither the agreement, nor parol evidence of the contents, was admissible to shew that the consideration money had not been paid. *Baker* v. *Dewey*, 4 *G.* 4. *Page* 99

2. In replevin by *A.* for growing crops, the point at issue was, whether *A.* and *B.* were joint-tenants to *C.* of the land on which the distress was made:—*Held*, that *B.* might be examined as a witness to disprove the joint-tenancy, not being liable to costs; and that he was at least examin-

able on the voir dire, as to his interest in the event of the suit. *Bunter* v. *Warre*, 4 *G.* 4. *Page* 106

3. The Courts of this country will take no notice of the revenue laws of foreign states. Therefore, where assumpsit was brought for money lent, in *France*, and unstamped receipts were produced in proof of the loan, evidence to shew that by the law of *France* such receipts required stamps to render them valid, was rejected. *James* v. *Catherwood*, 4 *G.* 4. 190

4. It is not necessary to produce the original order for the discharge of an insolvent debtor, in order to prove the title of his assignee to maintain ejectment, as such, under the 1 *Geo.* 4. c. 119. s. 4. *Doe* v. *Land*, 4 *G.* 4. 509

5. Where plaintiff declared in case against defendant for a malicious arrest, by going before a Justice, and there falsely charging him with an assault, and causing the Justice to grant his warrant for apprehending him, by virtue of which he was arrested, and committed to prison until he found sureties, and that defendant afterwards preferred an indictment against plaintiff, which was ignored at the Sessions, and in order to prove the information and warrant, upon which plaintiff was arrested, the committing Justice, the deputy clerk of the peace, and the constable, were severally examined, and it appearing from the evidence of the first, that he had delivered the information to the deputy clerk of the peace, or his clerk, and knew nothing more of it, and that he had granted a warrant for the apprehension of the defendant, but did not know where it was: from the evidence of the second, that he had searched for the information, but could not find it; and said, that it might have been returned to the Sessions, and delivered to his clerk, without his knowledge; that it probably was not returned at all, and that if it was, it might have been destroyed, when the bill was thrown out; and from the evidence of the third, that he did not know what had become of the information, but that he gave the warrant to the gaoler, who was not examined:—Held, that the plaintiff was at liberty to go into secondary evidence of the contents of the information and warrant, and such evidence having been rejected by the Judge at nisi prius, the Court ordered a new trial, without costs. *Freeman* v. *Arkell*, 4 *G.* 4. *Page* 669

6. A count for maliciously indicting for an assault, cannot be supported without proof of some consequential injury sustained by the plaintiff. *Id.* *ib.*

## EXCEPTION AND RESERVATION.

*See* Trespass.

## EXECUTION.

*See* Practice, 4.

## EXECUTORS.

*See* Limitations, Statute of, 1.

## EXEMPLIFICATION.

*See* Recovery.

## FEES.

*See* Requests, Court of, 2.

## FELONY.

*See* Certiorari, 3.

## FISHERY.

*See* Infant.

## FIXTURES.

*See* Vendor and Vendee, 1.

## FOOTPATH.

*See* Highway, 1.

## FRAUDS, STATUTE OF.

1. Where a person entered a tradesman's shop, and selected various articles, some of which he marked with a pencil, and others were cut from piece-goods, and laid aside for him (the whole amounting to more than 10*l.*) and desired them to be sent home; and when sent, he refused to take them:—Held, first that the contract was joint; and second, that there was no acceptance to take the case out of the statute of Frauds. *Baldey* v. *Parker*, 4 *G.* 4. *Page* 220

2. Where a person attending a public auction room, bid for a lot, and after having been declared the highest bidder, the article was immediately delivered to him, but in a few minutes afterwards he stated that he had been mistaken in the price and refused to take it:—Held, that it was a question of fact for the Jury, whether there was such an acceptance of the article as would take the case out of the statute of Frauds, so as to shew that it was the intention of both parties to be bound by the sale, no deposit upon the price having been made by the vendee agreeably to one of the printed conditions in the catalogue. *Phillips* v. *Bistolli*, 4 *G.* 4. 822

## GAMBLING.

*See* King's Bench Prison.

## GAOL ALLOWANCE.

*See* Prisoners.

## GUARANTY.

Where the firm of *I.* & *Co.* gave a guaranty to *P.* & *Co.*, that they would indorse any bill or bills, which *S.* might give to *P.* & *Co.* in part payment of an order for certain goods then executing for him: *P.* & *Co.* to allow 5*l.* per cent. on the amount of the bills, for the guaranty; and in part payment of the goods *S.* gave *P.* & *Co.* a bill at eighteen months, which the latter kept for seventeen months and ten days, and then finding that *S.* was insolvent, applied, for the first time, to *I.* & *Co.* for their indorsement, tendering the amount of commission:—Held, that *P.* & *Co.* were concluded, by their laches, and that *I.* & *Co.* were not liable on their guaranty. *Payne* v. *Ives*, 4 *G.* 4. *Page* 664

## HABEAS CORPUS.

Where, in the return to a writ of habeas corpus, two causes were assigned for a prisoner's detention, first, a conviction, for smuggling; and second, desertion from the navy:—Held, that the latter cause could not be impeached on affidavit for the purpose of shewing, either that the prisoner had never been a seaman in his Majesty's navy, or that supposing him in fact a seaman, he had been illegally impressed in the first instance. *Rex* v. *Rogers*, 4 *G.* 4. 607

## HAWKER.

1. The manufacturer of goods cannot, without a hawker's licence, vend his wares in any other than the places enumerated in 50 *G.* 3.

c. 41. s. 23; and a manufacturer hawking his goods in a different place *without any licence* so to do, may be convicted in a 10*l.* penalty only, under s. 17. of the act, although s. 20. imposes a 40*l.* penalty for an offence apparently of the same description. *Rex* v. *Websdell*, 4 *G.* 4. *Page* 360

2. Exposing to sale, and selling *tea* as a hawker without a licence is an offence against the statute 50 *G.* 3. c. 41. and subjects the offender to a penalty of 10*l.* although by 12 *G.* 3. c. 46. s. 6. it would be an offence for a hawker to sell tea in an unentered place, even if he had a hawker's licence. *Rex* v. *M'Gill*, 4 *G.* 4. 377

3. The agent or servant of an unlicenced hawker is equally liable with his principal to a penalty if he sells without a hawker's licence. *Id.* *ib.*

## HEREFORD.

*See* Practice, 6.

## HIGHWAY.

1. By 55 *Geo.* 3. c. 68. s. 2. the consent in writing for turning a footpath must be under the hand and seal of the owner of the land through which the new path is proposed to be made; therefore where an order of Justices for turning a foot-path was founded upon a consent signed, and sealed by the attorney of one of the parties interested, and there being nothing to bind the principal:—Held ill, and quashed by this Court after confirmation by the Sessions. An order made under this statute cannot be confirmed until the Sessions held next after the expiration of four weeks from the first day on which the notices required by law shall have been published; therefore where an order was made for diverting a path, and notice thereof given on the 20th *December*, and it was confirmed at Sessions on the 17th *January*:—Held irregular and quashed. *Rex* v. *Crewe*, 4 *G.* 4. *Page* 6

2. The 13 *G.* 3. c. 78. s. 80. prohibits the removal by certiorari into this court, of any proceedings had in pursuance of that act. Where an order was made by two Justices, and confirmed by the Sessions for diverting a road professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act:— Held, that the certiorari was still taken away; and after the proceedings had been in fact removed, the Court quashed the certiorari quia improvide emanavit, and refused to discuss the sufficiency or insufficiency of the order. *Quære* whether an order for diverting and turning an old road need set out the names of the owners of the land through which the new road is proposed to be carried? *Rex* v. *Casson*, 4 *G.* 4. 36

3. A parish is liable as of common right to repair all highways therein, but an indictment will not lie against a district called an extra parochial hamlet, for not repairing a public highway within the same, unless some special ground of liability to repair is alleged. *Rex* v. *Kingmore*, 4 *G.* 4. 398

## HUNDRED.

1. Hustings erected to take the poll at a contested election for

members to serve in parliament, are not a *building* within the 57 *G.* 3. c. 19. s. 38. and therefore no action lies against the hundred for the destruction of such property by a tumultuous assembly. Where hustings erected at the expence of the candidates at a contested election were damaged by a riotous assembly, and were afterwards repaired at their expence:—*Held*, that no action lay at the suit of the returning officer against the hundred. *Allen* v. *Ayre*, 4 *G.* 4. *Page* 96

2. The owner of stacks of corn maliciously set on fire may maintain an action, against the hundred, on the 9 *Geo.* 1. c. 22. although he has previously received the full amount of his loss from an insurance office. *Clark* v. *Blything*, 4 *G.* 4. 489

## INCLOSURE.

*See* Covenant, 1.—Appeal, 1.

## INDENTURE.

*See* Settlement, 4, 6.

## INDICTMENT.

*See* Bridge.—Perjury, 1.—Variance, 3.

## INFANT.

Tutor's dative, appointed by a *Scotch* Court, as guardians of an infant, executed for, and on his behalf, and in his name, a tack or agreement for a lease, whereby a salmon fishery was demised for years to a tenant at a certain rent, covenanted to be paid to the tutor's dative, the infant, or to any other person or persons duly authorized to receive the same for behoof of the infant, his heirs or assigns:—Held, that the infant might maintain debt in his own name for arrears of rent, though he was not an executing party to the agreement, nor proved to be of full age at the time of action brought. *Fitzmaurice* v. *Waugh*, 4 *G.* 4. *Page* 273

## INFORMATION.

*See* Libel, 1.

## INHABITANT.

*See* Requests, Court of.

## INSANITY.

*See* Libel.

## INSOLVENT.

*See* Bankrupt, 2.—Case, 1.—Evidence, 4.

1. The creditor of an insolvent debtor, who has petitioned to be discharged under the Insolvent Act, obtains from his debtor, whilst in prison, a bill of exchange for his debt, and indorses it to an innocent holder, for valuable consideration:—Held, that though this might be a fraudulent preference of the creditor, the insolvent's discharge was no bar to an action upon the bill, by the innocent indorsee. *Simpson* v. *Pogson*, 4 *G.* 4. 567

2. An insolvent debtor, who has been arrested, and given a bail-bond for a debt contracted before his discharge, under 1 *G.* 4. c. 119, must plead to the action; the Court having no power to relieve him on motion, either by setting aside the proceedings or ordering common-bail to be filed. If he is detained in custody, it is otherwise. *Done* v. *Smith*, 4 *G.* 4. 600

## INSURANCE.

*See* HUNDRED, 2.

Where a vessel was driven by tempestuous weather into a foreign port, and in order to defray the expences of repairing, (without which she could not proceed on her voyage), the captain was obliged to sell part of the cargo: Held, that the underwriters were not liable for a total loss by perils of the sea. *Sarguy* v. *Hobson*, 4 *G*. 4. *Page* 192

## INTEREST.

Interest is not recoverable in covenant upon a policy of insurance, payable six months after due proof of the death of *A*. although the money insured is not paid at the time stipulated. *Higgins* v. *Sargent*, 4 *G*. 4. 613

## JUDGMENT.

*See* COVENANT, 1.—PRACTICE, 1. TRANSPORTATION.

## JURISDICTION.

*See* ECCLESIASTICAL JURISDICTION, 1.—REQUESTS, COURT OF, 1.—TAXES.

## JURY.

*See* COURT-LEET.

## JURY PROCESS.

1. After a tales panel on an indictment for libel, (appointed to be tried by a special jury) had been quashed for unindifferency in the sheriff:—Held, that a venire facias juratores might be awarded to the coroners, though two of the special jurors summoned had attended on the former occasion. *Rex* v. *Dolby*, 4 *G*. 4. 311

2. Upon the prayer and award of a tales de circumstantibus, at nisi prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the by-standers accidentally in court; they may be selected out of persons previously appointed by the coroner or sheriff to be in attendance, in the expectation that a tales would become necessary. *Rex* v. *Dolby*, 4 *G*. 4. *Page* 311

## JUSTICE OF THE PEACE.

*See* APPEAL, 1.—OVERSEERS, 2.—PRISONERS.

## KING, THE.

*See* LIBEL.

## KING'S BENCH PRISON.

Prisoners found gambling in the King's Bench Prison are liable to be punished, in the discretion of the Court. *In re Stephens*, 4 *G*. 4. 599

## LANDLORD AND TENANT.

*See* LEASE, 1, 2, 3.—LIMITATIONS, STATUTE OF, 3.

1. Where a lease for years expired at *Midsummer*, and the tenant refused to give up possession of the premises, insisting that he was entitled to notice to quit, and afterwards continued in possession until *Christmas*, and paid rent to *Christmas*, when he tendered the keys of the premises to his landlord, which the latter refused to take:—Held, that this was not a holding over, but conclucive evidence in presumption of law of a tenancy from year to year, which would entitle the landlord to maintain use and occupation for a quar-

ter's rent, due at *Lady-Day*. *Bishop* v. *Howard*, 4 *G*. 4. *Page* 293

2. In action on the 11 *Geo*. 2. c. 19. against a tenant, for fraudulently removing his goods to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal takes place with his privity. *Lister* v. *Brown*, 4 *G*. 4. 501

## LEASE.

*See* Annuity, 3.—Landlord and Tenant, 1.—Pleading, 1.—Way.

1. An instrument not under seal, whereby *A*. agrees to let, and *B*. agrees to take and rent certain premises, to hold *henceforth* for a term of thirty-four years, determinable by either party on giving twelve months notice, at the end of the first seven, fourteen, or twenty-eight years, at a certain yearly rent, clear of all taxes; and *B*. binds himself to keep the premises in tenantable repair during the term, with a further agreement on the part of *A*., to grant a lease on the like terms, with usual covenants, within three months, is not a lease, though it contain words of present contract. *Colley* v. *Streeton*, 4 *G*. 4. 522

2. A tenant holding under a special agreement, (which is to be the basis of a future lease,) containing several obligations, one of which is to keep the premises in tenantable repair, may be sued in assumpsit generally for not repairing, without setting out the special agreement, under a count "that defendant became tenant of premises, and in consideration thereof undertook to repair;" and the special agreement may be given in evidence, to prove the fact of a tenancy, as the consideration for the promise to repair. *Colley* v. *Streeton*, 4 *G*. 4. *Page* 522

3. Lessee, bound by covenant to repair, under-lets part of the demised premises, with a like obligation by his tenant to repair within three months after notice for that purpose. The premises under-let becoming out of repair, the superior landlord gives notice to his immediate tenant to repair, at the peril of forfeiting his lease. Under-tenant, after notice, neglects to repair within three months; whereupon lessee, to avoid a forfeiture of his whole estate, enters and puts the premises in tenantable repair:—Held, that his under-tenant was liable to him for the whole expence so incurred, although the former had sold his interest in the premises to a purchaser, who had entirely rebuilt them, before action brought. *Id*. *ib*.

## LESSOR AND LESSEE.

*See* Covenant, 2.

## LIBEL.

On an information for falsely and maliciously publishing a libel concerning the King, by giving it out, that his Majesty was afflicted with mental derangement, and a verdict of guilty having passed against the defendants, it was resolved, 1st, That to assert falsely of his Majesty, or of any individual, that he labours under the affliction of mental derangement, is a criminal act, and a malicious intention may be inferred from the mere fact of publication, unless evidence is given by the defendant to rebut such inference; 2d, That such an assertion concerning the king, being in itself mischievous to the pub-

lic, is an indictable offence, without any allegation or direct proof of a malicious intention; 3d, That where the Jury desired to know "whether, in order to convict a defendant for the publication of a libel, a *malicious intention* must not have existed in his mind," they were correctly answered by the Judge, who told them, that "a person who publishes that which is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can shew the contrary; and the onus of proving the contrary lies upon him;" and 4th, That where the publisher of a libel states, that the fact which he communicates is "*from authority*," and it turns out that the fact is untrue, he is guilty of a *false* assertion in the criminal sense of the word. *Rex* v. *Harvey*, 4 *G*. 4. *Page* 461

## LIMITATIONS, STATUTE OF.

1. *A*. and *B*. make a joint and several promissory note, and after the lapse of six years, *A*. dies, leaving *B*. one of his executors, and *B*. subsequently pays interest on the note, not in his executorial character, but personally as a maker of the note:—Held, in an action by the executors of the payee of the note against *A*.'s executors, alleging, first, a promise by the testator in his life-time; and second, a promise by the executor after his death, that the payment within six years of interest by *B*. (who suffered judgment by default) was not sufficient to take the case out of the statute of Limitations, as against the executors. *Atkins* v. *Tredgold*, 4 *G*. 4. 200
2. In assumpsit for seaman's wages, to which the statute of Limitations was pleaded, it was proved that the defendant being applied to for payment after the lapse of six years, said, "I will see my attorney, and tell him to do what is right."—*Semble*, this was not a sufficient acknowledgment to take the case out of the statute. *Miller* v. *Caldwell*, 4 *G*. 4. *Page* 267
3. A landlord having tortiously received from several of his tenants various sums of money, one of the tenants after the lapse of six years applied to have the money refunded; to this the landlord replied, "that if there was any mistake, it should be rectified:" Held, that this was such a recognition of liability as would take the case out of the statute of Limitations as to another tenant, although the latter had given no authority to the former to make the application on her behalf. *Clark* v. *Hougham*, 4 *G*. 4. 322
4. Where an administratrix had, after the death of her intestate, made a similar payment as above mentioned to the landlord, out of assets in her hands:—Held, that although it might be a wrongful payment, yet she might sue as administratrix to recover it back. *Id*. *ib*.
5. If a plaintiff relies upon fraud as an answer to a plea of the statute of Limitations, it must be specially re-pleaded, and cannot be taken advantage of under the common replication, that the defendant did promise within six years. *Id*. *ib*.
6. Where the evidence of the payments above mentioned consisted of memoranda of accounts delivered to the tenant, in which the items in question were set down, and to each of which was

written by the landlord the word "paid:"—Held, that such memoranda were admissible, without a stamp, when coupled with entries in the steward's books to the same effect. *Clark* v. *Hougham*, 4 *G*. 4. *Page* 322

## MANCHESTER AND SALFORD.

*See* RATE, 1, 2.

## MANDAMUS.

*See* COMMISSIONERS.—OVERSEERS, 1.—PRISONERS.

## MANOR.

*See* COURT-LEET.

## MARRIAGE.

*See* SETTLEMENT, 8.

## MUTUAL CREDITS.

*See* BANKER, 1.

## NON PROS.

*See* PRACTICE, 1.

## NORWICH.

By 10 *Ann.* the city of *Norwich*, and hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor thereof; and the guardians thereby appointed were empowered from time to time to ascertain what aggregate sums would be necessary for that purpose, and ascertain what proportion each parish, &c. should contribute, and then certify the same to the justices, two of whom were to issue their warrant requiring the proper officers of each parish, &c. to rate and assess the amount on the respective inhabitants; and it was provided, that if any person, parish, &c. should find himself or themselves to be unequally assessed, he, or they might appeal to the next sessions held after such *assessment made and demanded.* Where, under this Act, the governors certified that the hamlet of *L.* ought to pay a certain proportion of an assessment made on the whole city, and two justices issued their warrant requiring the collectors of the hamlet to assess that sum upon the inhabitants; and the hamlet being aggrieved by such assessment:—Held, that the churchwardens and overseers might appeal against both the certificate and the warrant thereon, as being *an assessment made and demanded*, within the meaning of the appeal clause. *Rex* v. *The Mayor of Norwich*, 4 *G*. 4. *Pa*. 42

## NOTICE OF APPEAL.

A notice of appeal against the allowance of overseer's accounts, that the different items thereof (enumerating them), would be objected to, without specifying the particular causes or grounds of appeal, pursuant to 41 *G*. 3. c. 23. s. 4. is insufficient. *Rex* v. *Mayall*, 4 *G*. 4. 383

## NOTICE TO QUIT.

*See* LANDLORD AND TENANT, 1.

Upon a written agreement to demise from the following "*Lady-day*," a notice to quit "on the 6th *April*," is good upon parol evidence, that by "*Lady-day*" the parties meant "*old Lady-day*." Such evidence is admissible where the written agreement is not under seal. *Doe* v. *Hopkinson*, 4 *G*. 4. 507

## NOTICE TO REPAIR.

*See* TRESPASS, 2.

## NUDUM PACTUM.

*See* AGREEMENT, 1.

## NUISANCE.

*See* TRESPASS, 2.—WAY.

## OFFICE.

*See* SETTLEMENT, 9.

## OUTLAWRY.

1. The writ of exigent upon an outlawry must be in the hands of the sheriff at the time the defendant is demanded.

Where the sheriff returned to a writ of exigent, and to a writ of allocatur exigent, that he had demanded the defendant at the hustings, upon five several days, when out of four of the five, the writs could not by possibility have been in his possession:—Held, that the returns were irregular. *Semble* also, that the writ of proclamation upon an outlawry is void, unless the requisites of 31 *Eliz.* c. 3. s. 1. are complied with.

An attorney making an affidavit to support a motion to set aside an outlawry against a defendant, who has not appeared, must shew that he is authorized to act for the defendant. *Volet* v. *Waters*, 4 *G.* 4. *Page* 55

2. Where, in proceeding to outlawry, one month had not elapsed between the *third* proclamation and the quinto exactus, pursuant to statute 31 *Eliz.* c. 3. s. 1, the Court reversed the outlawry as a nullity; but in pursuance of the discretion given by 6 *Hen.* 8. c. 4,—reversed it only on the condition of the defendant putting in special bail to the original action, supposing the want of due proclamation to be only an irregularity. *Taylor* v. *Waters*, 4 *G.* 4. 515

## OVERSEER'S ACCOUNTS.

*See* NOTICE OF APPEAL.—POOR.

1. Where ex-overseers of the poor delivered to succeeding overseers a certificated balance-sheet of the *gross sums* received and disbursed during the year in which they were in office, without any other voucher or document:—Held, that this was not a sufficient compliance with 17 *G.* 2. c. 38, and mandamus issued to the Justices to hear and determine a complaint for not properly accounting, pursuant to the statute. *Rex* v. *The Justices of Worcestershire*, 4 *G.* 4. *Page* 292

2. Where a local act of parliament, passed for regulating the affairs of the parish of *W.* declared, affirmatively, that there should be two overseers nominated and appointed to succeed those who were in office, at the time of passing the act:—Held, that the Justices might still appoint *four* overseers, under the authority of 43 *Eliz.* c. 2. *Rex* v. *Pinney*, 4 *G.* 4. 578

## PALACE COURT.

*See* VARIANCE, 3.

## PARTNERS.

*See* BANKRUPT, 3, 5.

Where a merchant employed a broker to purchase goods on speculation, and agreed verbally to allow him a certain portion of the profits on the sale, as a remuneration for his trouble:—Held, that the broker could not be considered such a partner with the merchant, as to vest in him a property in goods so purchased, or in the proceeds thereof, as against the assignees of the latter after he became bankrupt, al-

though as to third persons he might have been liable as partner.

A dormant partner is within the intent and meaning of the statute 21 *Jac.* 1. c. 19. s. 11. *Smith* v. *Watson*, 4 *G.* 4. *Page* 751

## PEERAGE.

The Court will not, on motion, cancel a bail-bond given by a person claiming to be an *Irish* peer, unless his peerage is clearly made out. *Storey* v. *Birmingham*, 4 *G.* 4. 488

## PENANCE.

*See* Ecclesiastical Jurisdiction, 2.

## PERJURY.

*See* Transportation.—Variance, 3.

*Semble*, that the Court will, on motion, quash an indictment for perjury, for want of an addition to defendant's name, if the exception be properly taken; but they refused to quash such an indictment, where the defendant produced no affidavit giving his proper addition. *Rex* v. *Thomas*, 4 *G.* 4. 621

## PLEA.

*See* Insolvent, 2. — Sham-pleading.—Trespass, 2.

A plea to assumpsit on a promissory note, "that defendant did not undertake," omitting the words, "or promise, in manner and form, &c." with a conclusion to the country, is not so unintelligible a plea as to entitle the plaintiff to sign judgment, for want of a plea. *Smith* v. *Jones*, 4 *G.* 4. 621

## PLEADING.

*See* Agreement. — Award, 3, 4.—Bill of Exchange, 3. — Case, 1. — Escrow. — Evidence, 5.—Lease, 1, 2, 3. – Limitations, Statute of, 5.—Practice, 1, 9.—Sham Pleading.— Slander. — Trespass, 2.—Variance, 3, 4.

1. Plaintiff, by indenture, demised to *J. W.* defendant's testator, certain premises, to hold from 29th *September*, 1820, for eleven years. *J. W.* covenanted, inter alia, that he would not, *during the lease*, sell or convey away from the premises, any straw grown thereon, during the *leased term*, except wheat-straw and rye-straw; and that for every load of hay, wheat-straw, and rye-straw, which should be sold or conveyed away from the premises, during the *leased term*, he would bring back a load of dung. Plaintiff covenanted, that *J. W.* should have the use of the barns, &c. for the receiving of his crops grown upon the premises, during the last year before the end of the term thereby granted, and for certain other purposes, until 1st *May* next after the expiration of the said term, without paying any rent for the same. The fourth breach alleged, that *J. W.* *during the said leased term, to wit, on 30th September*, 1820, *and on divers other days between that day and the 1st May*, 1821, did convey away from the premises large quantities of hay, &c. without bringing back a load of dung for each load of hay, &c. Plea to so much of that breach as respects the conveying away hay, &c. *during the said leased term*, that *J. W.* did bring back a load of dung for every load of hay, &c. conveyed away; demurrer

to the residue of that breach, and joinder in demurrer. Plea to all the breaches, and to so much of the fourth breach as respects the conveying away hay, &c. *during the said leased term* respectively, a release of all causes of action, except such claim as plaintiff had in respect of *J. W.* not bringing back dung for the hay, &c. conveyed away after 29th *September*, 1820. Demurrer and joinder:—Held, first, that the plea to part of the fourth breach covered the whole of that breach, and therefore the demurrer to the residue was a nullity; and second, that as *the leased term*, by construction of law, continued for certain purposes up to 1st *May*, 1821, and the release expressly excepted the acts done after 29th *September*, 1820, the plea of release did not answer all that it professed to answer, and being bad in part, was bad altogether. *Earl St. Germains* v. *Willan*, 4 *G*. 4. *Page* 441

2. To a declaration, in assumpsit, by the assignees of a bankrupt, for 1000*l*. had and received, defendant pleaded, that on an account stated between him and the bankrupt, before the bankruptcy, he (defendant) was found to be indebted to bankrupt in the sum of 400*l*.; that bankrupt drew a bill of exchange upon defendant for the said sum of 400*l*. payable to him or his order, which defendant accepted, and returned to bankrupt, whereby defendant became and was and still is liable to pay said sum of 400*l*. to bankrupt, or his order, or to his assignees, or their order; replication that before the bankruptcy, the bill became due, and was presented, and refused payment, by defendant, who still refuses to pay the same to the assignees:—Held, on general demurrer, that the defendant's plea was no answer to the action. *Thomas* v. *Heathorne*, 4 *G*. 4. *Page* 617

## POLICY OF INSURANCE.

*See* INTEREST.

## POOR.

*See* NORWICH.

*Quære*, whether able-bodied persons thrown out of their ordinary employment, and in consequence thereof unable to maintain themselves and families, are entitled to parochial relief in money as *impotent* poor, within the meaning of 43 *Eliz*. c. 2. s. 1.

It is the bounden duty of overseers to endeavour to find employment either in or out of their own parish, for able-bodied poor persons thrown out of their usual work: and it seems, that it is only in the event of such employment not being to be found, that they are authorized in giving pecuniary relief. *Rex* v. *Collett*, 4 *G*. 4. 532

## POOR RATE.

*See* VESTRIES.

## POOR REMOVAL.

*Semble*. It is not essential to the validity of an order of removal, that the pauper should be examined, but if it is possible the Justices are bound to examine him; and if they corruptly omit to summon him, for that purpose, they are liable to an information, or to an action at the suit of the pauper, if he is removed illegally. *Rex* v. *The Inhabitants of Tavistock*, 4 *G*. 4. 427

## PRACTICE.

*See* ACCOUNT.—BAIL, 1, 2.—INSOLVENT, 2.—OUTLAWRY, 1, 2. PEERAGE.—PERJURY.

1. A similiter must be delivered; if not, defendant is entitled to sign judgment of non pros. *Hollis* v. *Buckingham*, 4 *G.* 4. *Page* 1
2. On the 6th *February*, plaintiff took out a rule to discontinue his action upon payment of costs, to be taxed by the Master, and on the 7th an appointment was given by the Master; but the costs were not in fact taxed, and paid until the 11th *March*. On the 29th *January* preceding, defendant in that action, sued out a writ against the plaintiff for a malicious arrest, and filed his bill on the 8th *February*, and it being objected that the latter action was brought before the first was legally discontinued:—Held in the negative; and that the discontinuance had (upon payment of the costs) relation back to the term when the rule to discontinue was pronounced. *Brandt* v. *Peacocke*, 4 *G.* 4. 2
3. By the practice of this Court a plaintiff cannot declare de bene esse upon process returnable the *last* return of the Term. *Key* v. *Brown*, 4 *G.* 4. 29
4. After declaration, plea and issue, which was joined in *Trinity*, defendant, on the 6th *November*, gave a cognovit for the debt and costs, and on the 11th, surrendered in discharge of his bail. In *Hilary*, plaintiff entered up final judgment:—Held, that in *Easter*, he might charge the defendant in execution, though the latter might have been previously supersedeable. *Morland* v. *Weston*, 4 *G.* 4. 31
5. Defendant being in custody within a local jurisdiction, plaintiff lodged a detainer against him, but discontinued the action from fear of a plea to the jurisdiction; and then arrested the defendant in this Court, without having paid his own costs of the first suit:—Held, that the defendant was not entitled to be discharged on filing common bail, the second suit not being vexatious. *Paine* v. *Gawdery*, 4 *G.* 4. *Page* 33
6. Where a defendant was arrested in the Mayor's Court of *Hereford*, and by the practice of that Court a plaintiff is not bound to deliver a declaration without a rule to shew cause for that purpose, and the defendant, without conforming to the practice, superseded the action for want of a declaration, and was again arrested in *London* for the same cause of action, the Court discharged him on filing common bail. *England* v. *Lewis*, 4 *G.* 4. 189
7. After a rule granted under 1 *Geo.* 4. c. 87. in a cause entitled *Doe, &c.* v. *Roe*, to which the tenant in possession appeared, judgment was entered up, and execution taken out against the tenant by *name*:—Held, no irregularity. *Doe* v. *Brown*, 4 *G.* 4. 230
8. Husband and wife being arrested, the latter is discharged out of custody, on filing common bail, and plaintiff declares against husband alone:—Held, irregular. *Cattarns* v. *Player*, 4 *G.* 4. 247
9. General demurrer to part of a declaration, and plea of the general issue to the rest, must be *delivered* to plaintiff's attorney, and not *filed* with the clerk of the papers; otherwise a nullity. *Dymock* v. *Stevens*, 4 *G.* 4. 248

10. A latitat is sued out against *A.*, and served upon *B.*, who files common bail, as being sued in the name of *A.*, and a declaration is delivered to him, which is returned to plaintiff's attorney.—An alias and a pluries are then severally sued out against *A.*, and *he* is served with the latter: Held, that the pluries was regularly sued out, though the original writ was served upon *B.*, and a declaration delivered to the latter. *Clarke* v. *Johnson*, 4 *G.* 4. *Page* 254

11. A defendant having been charged in execution upon a judgment, the plaintiff's attorney filed the committitur piece with the clerk of the dockets pursuant to the rule, *Easter*, 41 *Geo.* 3; but the latter having neglected to enter it on the judgment roll, within the time prescribed by the rule, the Court ordered the prisoner to be discharged, though there was no default in the plaintiff's attorney. *Purdon* v. *Brockbridge*, 4 *G.* 4. 597

## PRINCIPAL AND AGENT.

The consignee and agent of a vessel, chartered for a specific voyage, enters into an agreement with the captain, describing himself as, "*consignee and agent*" of the above brig and cargo, "*on behalf of Mr. M.*, merchant of *L.*" The agreement stating, that "it is witnessed *that the said parties agree*" that the vessel shall go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo, at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party; and then signs the agreement in his own name, without describing himself as agent;—Held, that he made himself personally liable for the freight of the homeward voyage. *Kennedy* v. *Gouveia*, 4 *G.* 4. *Page* 503

## PRISONERS.

At common law prisoners committed to gaol for trial, and having no means of supporting themselves in the mean time, are not entitled to any maintenance at the public expence. The 19 *C.* 2. c. 4. and 31 *G.* 3. c. 46. require the Justices to provide a stock of materials for the employment of such prisoners; and the 4 *G.* 4. c. 64. authorizes the Justices to set such prisoners to work, "with their own consent," in order to maintain themselves. Where a visiting Justice reported to the Sessions, as an abuse, that untried prisoners had been set to work on a machine, called the tread-mill, contrary to their own inclinations; and the Sessions thereupon ordered that such mode of employment should be applied to other prisoners, as well as those sentenced to hard labor, and that those committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only:—Held, that mandamus would not lie to compel the Justices to order such prisoners any other food; and that in ordering even an allowance of bread and water, they had done more than they were by law bound to do. *Rex* v. *The Justices of the North Riding of Yorkshire*, 4 *G.* 4. 510

## PRIVILEGE.

*See* AMBASSADOR.

## PROCEDENDO.

See TRANSPORTATION.

## PROHIBITION.

See ADMIRALTY, 1, 2.

## PROMISSORY NOTE.

See BANKRUPT, 5.—LIMITATIONS, STATUTE OF, 1.

A promissory note, whereby the maker "promised to pay *W.* or bearer the sum of 40*l.* value received, with interest," being in law a note payable *on demand*, requires a five-shilling stamp, by 55 *Geo.* 3. c. 184. Sched. part 1. *Whitlock* v. *Underwood*, 4 *G.* 4. Page 356

## RATE.

See CHURCHWARDENS.

1. By the *Manchester* and *Salford* paving and lighting act, 32 *G.* 3. the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, and other buildings, gardens, garden ground, and other *tenements*, within the same towns, are liable to be rated for the purposes of the act. Under this act the *Manchester* and *Salford* water-works Company are not rateable as occupiers of a *tenement*, in respect of their water pipes carried under ground, for supplying those towns with water. *Rex* v. *The Manchester and Salford Water Works*, 4 *G.* 4. 20
2. By the *Manchester* and *Salford* paving and lighting act, 32 *G.* 3, the tenants and occupiers of all messuages, houses, &c. *and other tenements*, within the same towns, are liable to be rated. The lord of the manor of *Manchester* being owner of the market in that town, is not liable under this act to be rated in respect of his occupation thereof: and the tolls arising therefrom, as the occupier of a *tenement*. *Rex* v. *Moseley*, 4 *G.* 4. Page 385
3. Where trustees under a local act of parliament were authorized to borrow by annuity, or at common interest, a sum *not exceeding* 30,000*l.* for the purpose of building a chapel, and for other purposes in the act mentioned, and the monies so borrowed, and the interest thereof, were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act, and the trustees in fact borrowed a sum of 32,636*l.*, and made a rate to pay the interest of that sum:—Held, on demurrer, in an action of replevin by an inhabitant upon whom an aliquot proportion of the rate was levied, that the trustees had exceeded their power, and that the rate was bad in toto, although the defect did not appear on the face of it. *Richter* v. *Hughes*, 4 *G.* 4. 788

## RECOVERY.

The exemplification of a recovery suffered in bar of an intail, cannot be impeached by the recovery-deed itself, although it is suggested, that there have been alterations and erasures made in the latter not noticed in the former. *Doe* v. *Pickering*, 4 *G.* 4. 497

## REPLEVIN.

See EVIDENCE, 2.—VARIANCE, 2.

## REQUESTS, COURT OF.

1. Assumpsit for use and occupation is a cause of action within the jurisdiction of the *Bath* Court of Requests; and a defendant occupying a warehouse in that

city, though he does not personally reside, is entitled to be sued within the local jurisdiction for a debt under 10*l.* arising out of the limits thereof. *Axon* v. *Dallimore*, 4 *G.* 4. *Page* 51

2. It seems that the prothonotary of the Court of Requests, *Whitechapel*, is not authorized in receiving of a plaintiff suitor at one payment *all* the fees necessary to bring his cause to issue *before* the suit is at issue. *In re Farmer*, 4 *G.* 4. 602

## REVENUE LAWS.

*See* Evidence, 3.

## RULES.

*See* Practice, 11.

## SALE.

*See* Variance, 5.—Vendor and Vendee.

## SCIRE FACIAS.

*See* Warrant of Attorney.

## SESSIONS.

*See* Appeal, 1, 2, 3.—Highway, 1.—Prisoners.

## SETTLEMENT.

1. An intestate dies seised of a leasehold cottage, leaving his wife and three daughters, him surviving. The wife obtains letters of administration, but makes no distribution of her husband's effects. The husband of one of the daughters is, with permission of the administratrix, let into possession of the cottage, and he, and his wife reside therein for some years until they become chargeable to the parish, without paying any rent, which during that time was paid by the administratrix:—Held, that the pauper had not such an estate in the premises, that a court of equity would have decreed a conveyance, and clothed him with a legal title, so as to confer a settlement by an irremoveable residence of forty days. *Rex* v. *The Inhabitants of Berkswell*, 4 *G.* 4. *Page* 9

2. A pauper was hired as ground keeper, and his master agreed to give him 20*l.* a-year wages, a cottage to live in, and the joist and whole profits of one cow, for his own services; and the sum of 28*l.* and the joist, and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his master's labourers. The contract being entire, and the annual value of the lands on which the two cows were depastured, being more than 10*l.*:—Held, that he gained a settlement by renting a tenement, within the meaning of the statute. *Rex* v. *The Inhabitants of Cherry Willingham*, 4 *G.* 4. 13

3. The lord of a manor gave *G.* a licence in writing to build a house on the waste, which he built accordingly, and sold it to *B.* who again sold it to *T.* for 30*l.* *T.* occupied the house for five years, and paid annually one shilling to the lord; and then resold it for 34*l.*:—Held that *T.* did not purchase such an estate, or interest either legal or equitable, as to gain him a settlement by virtue of 9 *G.* 1. c. 7. s. 5. *Rex* v. *The Inhabitants of Hagworthingham*, 4 *G.* 4. 16

4. Where the owner of a colliery, by indenture hired certain workmen to be employed in the colliery for one whole year, at the wages of 1s. 10*d.* for a good day's work not exceeding fourteen

hours, and 2*d.* a day additional when that time was exceeded; and they were to forfeit 10*s.* 6*d.* for every act of disobedience, and 2*s.* 6*d.* a day for lying idle (to be deducted out of their wages) with a proviso that the jurisdiction of the justices should not be ousted in case of disputes; and a covenant that if at *Christmas* the master should have occasion to repair the machinery belonging to the colliery he might stop the works at the farthest, for a week, without paying any wages to the workmen 'unless otherwise employed:—Held, that this was a conditional and not an exceptive contract; and that a workman who had served under it for one whole year thereby gained a settlement. *Rex* v. *Byker*, 4 *G.* 4. *Page* 330

5. The owner of a colliery by agreement hired his workmen for a whole year, but they were not to be required to work during ten days in the *Christmas* holidays; during the working days they were to receive 2*s.* 6*d.* per day wages; and if they neglected to work on any one day, they were each to forfeit a penalty of 1*s.*; they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work: and as soon as that was accomplished, they were to be at liberty to go where they pleased; and though there was a reservation of the jurisdiction of the Justices in case of any disputes: — Held, that this was an exceptive contract, and that a workman who had served under it for one whole year did not thereby gain a settlement. *Rex* v. *Gateshead*, 4 *G.* 4. 333

6. Where a parish apprentice was bound by two justices, and the order was referred to in the indentures, but not by the *date* thereof:—Held, that the indentures were void by 56 *Geo.* 3. c. 139. ss. 1 & 5. and conferred no settlement by service under them. *Rex* v. *Bawburgh*, 4 *G.* 4. *Page* 338

7. The 35 *G.* 3. c. 101. s. 4. does not prevent a person from acquiring a settlement by paying public parochial taxes in respect of a tenement *above* the yearly value of 10*l.*; although there is no residence for a whole year, as required by 59 *Geo.* 3. c. 50. *Rex* v. *St. Pancras*, 4 *G.* 4. 343

8. Where a married woman upon the death of her husband assumed her maiden name, and after the lapse of several years was married by banns to a second husband in that name, with the description of "widow:"—Held, that in the absence of fraud, such marriage was legal, and that her settlement followed that of the second husband. *Rex* v. *St. Faith's Newton*, 4 *G.* 4. 348

9. Where the Court-leet of the manor of *A.* appointed a person to be street driver of the borough of *R.*, a district within the manor extending into seven parishes, in one of which he afterwards became chargeable, as a pauper, and it appearing, first, that it was not an annual office; second, that he took no oath of office; and third, that he had not served under the appointment, for one whole year: Held, that he had not such a public annual office, or charge as would gain him a settlement, under 3 *W.* & *M.* c. 11. s. 36. *Rex* v. *Yalding*, 4 *G.* 4. 352

10. Where a pauper was hired for a year, as shepherd, and was to have a house and garden rent-free, 7*s.* a week, and the going of thirty sheep, with his master's

flock, as wages, the feed of the sheep alone being worth 16*l.* a-year, and he lived for two years with his master under the agreement:—Held first, that as it did not appear to have been part of the bargain, that the sheep were to be fed with *growing produce;* and second, that as the pauper by residing in his master's cottage as a *servant* did not "come to settle," he did not acquire a settlement by renting a tenement, within the meaning of 13 & 14 *Car.* 2. c. 12. *Rex* v. *Bardwell,* 4 *G.* 4. *Page* 369

11. A labourer in husbandry hired himself from *Michaelmas* to *Michaelmas* at weekly wages, and, by the terms of the contract, he was to have a month in harvest to himself; and if he and his master could not agree for the harvest month, he was to harvest where he pleased. At the commencement of the harvest, he agreed with his master to work on the terms then offered, and continued in the service during the whole year:—Held, that this was an exceptive, and not a conditional hiring, and therefore no settlement was gained by service, under it. *Rex* v. *Althorne,* 4 *G.* 4. 375

12. Where the owner of a mansion house, and gardens, agreed with the pauper to take care of the garden, and for his so doing, he was to take the issues, and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master, and he was to continue in the premises for a year, unless some other person before that time should occupy the mansion, in which case, the gardens were to be delivered up; and the pauper continued in the occupation of the garden on these terms for more than a year, the produce being worth to him 70*l.* per annum:—Held, that the pauper being only a servant, and the residence, not being his own, he did not come to settle within the meaning of 13 & 14 *Car.* 2. c. 12. *Rex* v. *Shipdham,* 4 *G.* 4. *Page* 384

13. Vendor contracted in writing with vendee for the sale of a messuage, with immediate possession, at the price of 310*l.* to be paid in two instalments, the first, on the 30th *November,* and the second on 24th *June,* following, when the vendor was to make out a good title, and execute a conveyance. But in case of non-payment of the money on that day, the agreement to be void. Vendee having paid the first instalment, was let into, and remained in possession for more than a year and a half afterwards, but never paid the last instalment, nor had any conveyance executed. An action was brought by vendor for the remainder of the purchase money, but discontinued upon vendee giving up the contract, and receiving back part of the first instalment:—Held, first, that by this contract the vendee did not gain a settlement under 9 *Geo.* 1. c. 7. s. 5. by the purchase of an equitable estate; and secondly, that he had not such a possessory right during the interval from the 30th *November* to 24th *June,* as to gain him a settlement, by renting a tenement of 10*l.* value, under 13 & 14 *Car.* 2. c. 12. *Rex* v. *Geddington,* 4 *G.* 4. 403

## SHAM PLEADING.

It seems the Court will not call on a defendant to verify on affidavit a plea sworn by the plaintiff to

## STAY OF PROCEEDINGS.

*See* Costs, 1.

## SUPERSEDEAS.

*See* Practice.

## TALES.

*See* Jury Process.

## TAXES.

*See* Settlement, 7.

The collector of the personal assessed taxes may, by 43 *Geo.* 3. c. 99. s. 33. distrain "the *person* or *persons* so charged, by *his* or *their* goods and chattels, and all such other goods and chattels as they are by that statute authorized to distrain;" and by s. 38. the remedies given by the bankrupt laws, &c. are extended to the collector, for enforcing the payment of the same taxes. Where the Duke of *M.* was by the trusts of his father's will, allowed to use the furniture in the mansion of *B.* during his natural life, and was prohibited from removing it thence, without the consent of the trustees:—Held, that such furniture could not be distrained for the Duke's personal taxes returned as payable at the mansion of *B.*, and that it did not fall within the description of such "other goods and chattels," as might be distrained by force of s. 38:—Held also, that the jurisdiction of this Court to try the legality of a distress upon the goods of *A.* for an assessment upon *B.*, was not taken away by s. 3. which enacts, that "if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners." *Earl of Shaftsbury* v. *Russell*, 4 *G.* 4. *Page* 84

## TENANCY.

*See* Evidence.

## TENEMENT.

*See* RATE.—SETTLEMENT.

## TITHES.

*See* COVENANT.

Seed tares are a great or rector's tithe, and pass to the impropriator, under a grant of "decimas garbarum et granorum," when coupled with evidence of perception. *Dawes* v. *Benn*, 4 *G.* 4. *Page* 122

## TITLE.

*See* CASE.

## TOLLS.

*See* RATE.—TURNPIKE.

## TRANSPORTATION.

Where a prisoner was convicted of perjury in an inferior jurisdiction, and the sentence of transportation was entered on the record, as follows: "Wherefore all and singular the said premises being seen by the said justices here, and fully understood, it is therefore *ordered* that he the said *L. K.* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years, &c." Held, on error brought, that this was no judgment at all, and this Court awarded a procedendo to the Court below, commanding them to pronounce the proper judgment; but in the mean time allowed the prisoner to be bailed. *Rex* v. *Kenworthy*, 4 *G.* 4. 173

## TRESPASS.

1. *A.* being seised of the manor of *F.* and of the demesne lands thereof, and of all coal mines therein, in fee, grants to *B.* part of the lands in fee, *excepting and reserving* to himself, his *heirs and assigns*, all tithes of corn arising therefrom, and also *excepting and always* reserving out of the said grant to himself *and his heirs*, all the coals in the lands so granted, *together with* free liberty for himself, *his heirs, and his and their assigns and servants*, from time to time and at all times thereafter *during the time* that he *and his heirs* should *continue owners of the demesne lands of F.* to sink and dig pits, or otherwise to sough and get coals in the said lands, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals, at his and their will and pleasure, he and *his heirs* from time to time giving and paying to the grantee, *his heirs and assigns*, such satisfaction for damage as the grantee *and his heirs* should sustain by reason of getting and carrying away the said coals in the said lands, as two gentlemen, neighbours, indifferently chosen by the grantor and grantee, *their heirs and assigns*, should from time to time award. An heir of the grantor, by descent, having aliened the manor and demesne lands of *F.* and the coals therein, in fee, to *C.*, the latter entered the lands granted to *B.*, and dug pits and carried away coals therefrom, and trespass being brought against him, and his servant:—Held, on demurrer, 1, That under the general exception and reservation contained in the grant to *B.*, the coals remained in *A.* and his heirs, and would pass to his or their *assigns* under the word "heirs;" and 2d, that the special liberty

as to the manner of taking the coals, was not restrictive, but in furtherance of the previous exception of the coals out of the grant, and would enure for the benefit of *C.* as owner *by purchase*, of the manor and demesne lands of *F.* *Lord Cardigan* v. *Armitage*, 4 *G.* 4. *Page* 414

2. To trespass for breaking and entering the plaintiff's close, called the manor, defendants pleaded, first, not guilty, and, second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public and common navigable river from time immemorial, and that there is in that part of the port which is within the manor, a certain ancient work or erection belonging to the said port, necessary for the preservation of the same, for the safety and convenience of the ships resorting thereto; that this work being damaged and in decay at the said times when, &c. it became necessary that the said work should be repaired, but that plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore defendants entered and repaired. Replication, de injuriâ suâ. A verdict having been found for the plaintiff on the general issue, and for the defendant on the special plea:—Held, that the plaintiff was entitled to judgment, notwithstanding the finding on that plea, inasmuch as it did not state that *immediate* repairs were necessary, or that any one bound to do so, had neglected to repair *after notice*, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. *Earl Lonsdale* v. *Nelson*, 4 *G.* 4. *Page* 556

## TROVER.

*See* Banker, 1.—Vendor and Vendee.

Goods bonâ fide sold to, and paid for, by, a customer, in the interval between a secret act of bankruptcy by the trader, and the suing out of a commission, are not recoverable in trover by the assignees, under 1 *Jac.* 1. c. 15. ss. 13 and 14. *Cash* v. *Young*, 4 *G.* 4. 652

## TRUSTEE.

*See* Ecclesiastical Jurisdiction, 1.—Rate, 3.

## TURNPIKE.

Where a turnpike act imposed a scale of tolls upon *horses only*, drawing or not drawing carriages, respectively, as the case might be, and by a clause of exemption it was provided, "that no person should be liable to pay toll more than once for passing and repassing the gates on the same trust at any time in any one day, with the *same horses and carriages*, through the same toll gate, but that every person having paid toll once, should afterwards pass and repass with the *same horses and carriages* toll free, during the same day, through the same gate where such toll was paid;" and a stage coach drawn by four horses, having passed through a gate on the trust, and paid the toll in the morning, and in the evening of the same day, the *same horses*,

drawing a *different coach* of the same name, belonging to the same proprietors, driven by the same coachman, but carrying different passengers and parcels for hire, attempted to repass the gate, and a second toll being demanded and refused, the collector seized one of the horses until it was paid:—Held, in trespass for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempted from a second toll. *Louring* v. *Stone*, 4 *G.* 4 *Page* 797

## VARIANCE.

*See* CARRIER.

1. Where a declaration in covenant against *A.*, the assignee of a lease for years [granting licence to *B.* to continue a certain channel through the bank of a navigable river, upon certain conditions], imported that the grantors had absolute possession of the channel, and full power to grant the use of it to *B.*, and it appeared from the indenture itself, that they were described merely as the persons "who have the greatest proportion or share in the profits of the said river, and that they by virtue of all or any powers and authorities vesting in, or enabling them, granted the licence to *B.*, his executors, administrators, and assigns:"—Held, first, that this was a variance; and, second, that the grantors had no authority to grant such an hereditament, within the meaning of 32 *Hen.* 8. c. 34, as would bind the assignee of the grantee. *Earl Portmore* v. *Bunn*, 4 *G.* 4. 145
2. In case for not taking sufficient pledges in a replevin bond, the declaration set out the record, and averred under a videlicet, that the plaint in the County Court was levied before *A.*, *B.*, *C.*, and *D.*, as suitors, and it appearing from the record itself, that it was levied before *E.*, *F.*, *G.*, and *H.*:—Held, no variance. *Draper* v. *Garratt*, 4 *G.* 4. *Page* 226
3. Indictment for perjury assigned on evidence given in the Palace Court, described the Court as "the Court of the King's Palace AT *Westminster*," and it appearing from the record of the trial below, that it was called "the Court of the King's Palace OF *Westminster*:"—Held, no variance. The same indictment averred, that the cause in which the alleged perjury was committed, "came on to be tried, and was then and there duly tried by a Jury of *the county*;" and the record of the trial stated, that the Jury came of the neighbourhood of *Westminster*:—Held, that as the cause was in fact so tried, and no county being mentioned in the record, it was no objection. *Rex* v. *Israel*, 4 *G.* 4. 234
4. Declaration against the sheriff for a false return, alleged, that from the day of the delivery of the writ, *until and at, and after the return* thereof, he was sheriff. The writ was returnable on the 12th, and the defendant's shrievalty expired on the 7th *February*: Held, no variance. *Jervis* v. *Sidney*, 4 *G.* 4. 483

## VENDOR AND VENDEE.

*See* SETTLEMENT.

Where a mansion-house was sold at public auction, without any

stipulation on the part of the vendor that the fixtures were to be taken and paid for separately, and the vendee, who had paid the purchase-money, entered into possession under a conveyance: Held, that the fixtures passed to the vendee, and were not the subject of trover:—Held also, that a demand of, and refusal to deliver, *fixtures*, would not entitle the vendor to such articles left in possession of the vendee, as appeared to be moveable goods and chattels. *Colegrave* v. *Dias Santos*, 4 *G*. 4. *Page* 255

## VESTRIES.

By the Vestry Act, 58 *Geo*. 3. c. 69. s. 3, persons rated to the poor in respect of any annual rent, profit, or value, not amounting to 50*l*., shall be entitled to one vote and no more at vestry meetings, and to an additional vote in respect of every additional 25*l*. to which they shall be rated, not exceeding six votes in the whole. Where, however, in the parish of *St. M.* the poor rates had, according to ancient custom, been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the person assessed:—Held, that persons so rated were not within the benefit of the 3d section of the Vestry Act, as to the plurality of votes, although assessed in respect of property exceeding 50*l*. in amount. *Nightingale* v. *Marshall*, 4 *G*. 4. 549

## VOTE.

*See* VESTRIES.

## WARRANT OF ATTORNEY.

*See* ANNUITY.

If the parties to a warrant of attorney agree that execution shall issue upon the judgment after a year and a day without reviving the judgment by *sci. fa.* there is nothing illegal in such a bargain, and execution may be taken out notwithstanding the statute *Westm*. 2.

Copyhold lands cannot be extended under an elegit, but, if the inquisition comprehends both freehold and copyhold, it may be good as to the former, and bad as to the latter.

Where, under one elegit, a moiety of defendant's lands were taken to satisfy a judgment; and under a second elegit, the *whole* of the remainder of his lands were taken instead of a moiety of the moiety:—Held, that the second elegit was a mere nullity and there was no occasion to apply to the Court to set it aside. *Morris* v. *Jones*, 4 *G*. 4. *Page* 603

## WAY.

Lease of a parcel of building ground described the premises as abutting on "an intended way of thirty feet wide," which was not then set out. Lessee underlets the premises, and describes them as abutting on "an intended way," without mentioning the width. The soil of the intended way, together with the adjacent land on the other side, is afterwards sold by the owner to another person, who narrows the intended way to the extent of three feet, by building a wall thereon:—Held, that the tenant

of a house built by the underlessee was entitled only to a way of necessity and convenience, and such being left him, he could not maintain case for the alleged encroachment. *Harding* v. *Wilson*, 4 *G*. 4. *Page* 287

## WITNESS.

*See* EVIDENCE.

END OF THE THIRD VOLUME.

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